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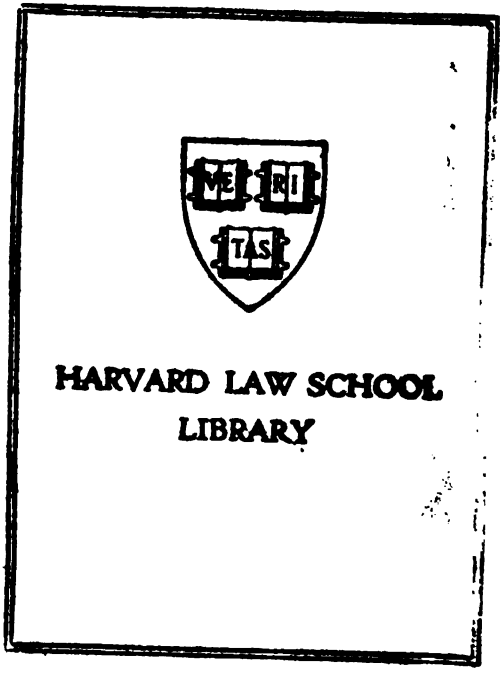

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REPORTS

OF

CIVIL AND CRIMINAL CASES

DECIDED BY THE

COURT OF APPEALS

OF KENTUCKY.

VOLUME XIX.

T. R. McBEATH, Reporter.

VOLUME 126, KENTUCKY REPORTS.

Containing Cases Decided from May 30, 1907, to Oct. 30, 1907

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COURT OF APPEALS OF KENTUCKY

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Hon. T. J. NUNN,
Hon. HENRY S. BARKER,
Hon. W. E. SETTLE,
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Hon JOHN D. CARROLL.

As Constituted now (1909).

Hon. W. E. SETTLE, Chief Justice.

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13th District—W. C. BELL .....Harrodsburg
14th District—R. L. STOUT .....Versailles
15th District—B. F. MENEFEE .....Crittenden
16th District—W. McD. SHAW .....Covington
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25th District—J. M. BENTON .....Winchester
26th District—M. J. MOSS .....Pineville
27th District—H. C. FAULKNER .....Barbourville
28th District—M. L. JARVIS .....Albany
29th District—H. C. BARKER .....Columbia
30th District—Jefferson Circuit Court—Louisville—
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SHACKELFORD MILLER, Chancery Branch, 1st Div.
SAMUEL B. KIRBY, Chancery Branch, 2nd Div.
EMMET FIELD, Common Pleas Branch, 1st Div.
TOMAS R. GORDON, Common Pleas Branch, 2nd Div.
Matt O'DOHERTY, Common Pleas Branch, 3rd Div.
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TABLE OF CASES

Adams v. Bosworth 61
American Tob. Co. a. Pittsburg, C., C. & St. L. Ry. Co.....582
Asher v. Cornett 569
Auditor, Hager, v. Ware 324
Bacon a. Commonwealth, ex rel Alexander 30
Ball, &c., a. Commonwealth 542
Bank of Waddy, &c., a. Citizens' Bank 169
Barker a. Commonwealth 200
Beckner v. Commonwealth 318
Beeler a. L. & N. R. R. Co. 328
Belknap a. Tilford, Bldg. Inspector 244
Berger v. Standard Oil Co. 155
Black v. McCarley's Exr. 825
Board of Council of Frankfort v. Brislan 477
Bosworth a. Adams 61
Breed a Parsons 759
Brislan a. Frankfort Board of Council 477
Brown v. Moss, Circuit Judge 833
Buchanan a. Ill. Cent. Ry. Co. 288
Bullock, &c., a. City of Covington 236
Butler v. Fiscal Court Jefferson County 146
Commonwealth v. Barker 200
Commonwealth v. Ball, &c. 542
Commonwealth a. Beckner 318
Commonwealth v. Chattanooga Imp. Mfg. Co. 636
Commonwealth a. Cin., N. O. & T. P. Ry. Co. 563
Commonwealth a. Cin., N. O. & T. P. Ry. Co. 712
Commonwealth v. City of Paducah 77
Commonwealth v. Dun, R. G., & Co. 108
Commonwealth v. Drewry 183
Commonwealth a. Eubank 348
Commonwealth a. Farris 46
Commonwealth a. Henry, &c. 35
Commonwealth a. Higgins 217
Commonwealth v. Huber 456
Commonwealth v. Jacobs 536
Commonwealth v. Kaufman 624
Commonwealth a. L. & N. R. R. Co. 279
Commonwealth v. Nunan 698
Commonwealth a. Simpson 441
Commonwealth v. Sollinger 66

Digitized by Google

Commonwealth v. Steele 670
Commonwealth v. Walton 523
Commonwealth a. Widows' & Orphans' Home of O. F. 386
Commonwealth v. Weisenburg, &c. 8
Commonwealth a. Young 474
Commonwealth, by, &c., v. Wathen 573
Commonwealth, ex rel Alexander v. Bacon 30
Commonwealth, ex rel Cummins, Sheriff, v. Ryan's Exr. 649
Commonwealth, for use, &c., v. Wade's Admr. 791
Caldwell a. Western Union Telg. Co. 42
Carrithers, &c., v. City of Shelbyville 769
Chesapeake & Ohio Ry. Co. v. Saulsberry 179
Chattancoga Imp. Mfg. Co. a. Commonwealth 636
Chesapeake Stone Co. v. Moreland 656
Cin., N. O. & T. P. Ry. Co. a. Musselliam 500
Cin., N. O. & T. P. Ry. Co. v. Commonwealth 712, 563
City of Cov., &c., v. Bullock, &c. 236
City of Cov. v. Cov. & Cin. Bridge Co. 163
City of Cov. v. Dalheim, &c. 26
City of Dawson Springs a. Hamby 451
City of Lex. a. Kemp s Trustee 211
City of Lex. a. Forsythe 211
City of Mt. Sterling v. King 526
City of Paducah a. Commonwealth 77
City of Paducah v. Jones, &c. 809
City of Shelbyville a. Carrithers, &c. 769
Citizens' Bank, &c., v. Bank of Waddy, &c. 169
Clark v. Raison, Jr., for Use, &c. 486
Cook, a. Stegeman 114
Cornett a. Asher 569
Corsicana Cotton Fac. a. Robinson, Norton Co. 749
Covington, City, v. Dalheim 26
Cov. & Cin. Bridge Co. a. City of Cov. 163
Cumb. Valley Land Co., &c., a. Skidmore, &c. 576
Dalheim, &c., a. City Cov. 26
Dawson Springs a. Hamby 451
Deshon, &c., a. Holt's Exr. 310
Douglass, &c., a. Hazelrigg, County Judge, &c. 738
Drewry a. Commonwealth 183
Dun, R. G., Co. a. Commonwealth 108
Dunn a. Meyers 548
Edelen, &c., v. Samuels & Co. 295
Eichman's Com. v. So. Cov. & Cin. St. Ry. Co. 519
Eubank v. Commonwealth 348
Farris v. Commonwealth 463

Digitized by Google

Fiscal Court Jefferson County a. Butler 146
Ford a. Metropolitan Life Ins. Co. 49
Forsythe v. City of Lexington 211
Frankfort Board of Council v. Brislan 477
German Ins. Co. v. Hazard Bank 730
Given, County Supt., &c., v. Trustees School Dist. 54 194
Growbarger, &c., v. U. S. Fidelity & Guaranty Co., &c.....113
Griffin's Admr. a. Howe's Exr. 373
Grundy a. Spaulding, &c. 510
Hager, Auditor, a. Ware 324
Hamby v. City Dawson Springs 451
Hazard Bank a. German Ins. Co. 730
Hazelrigg, County Judge, &c., v. Douglass, &c. 738
Henry, &c., v. Commonwealth 357
Herndon's Admr. a. L. & N. R. R. Co. 589
Higgins v. Commonwealth 211
Hobbs v. L. & N. R. R. Co. 1
Holt's Exr. v. Deshon, &c. 310
Howard's Admr. v. Hunter 685
Howe's Exr. v. Griffin's Admr. 373
Huber a. Commonwealth 456
Hunter a. Howard's Admr. 685
Ill. Cent. Ry. Co. v. Sheegog's Admr. 252
Ill. Cent. Ry. Co. v. Buchanan 288
Jacob a. Commonwealth 536
Jones, &c., a. Paducah 809
Kaufman a. Commonwealth 624
Kemp's Trustee v. City Lexington 211
King, a City Mt. Sterling 526
King a. McClure's Exr. 675
L. & N. R. R. Co. v. Beeler 328
L. & N. R. R. Co. v. Commonwealth 279
L. & N. R. R. Co. v. Herndon's Admr. 589
L. & N. R. R. Co. a. Hobbs 1
L. & N. R.R. Co. v. Mason & Hoge Co. 844
L. & N. R. R. Co. v. Mink 337
L. & N. R. R. Co. a. Parrish 638
L. & N. R. R. Co. a. Pendleton's Admrs. 605
L. & N. R. R. Co. a. Rader's Admrx. 722
L. & N. R. R. Co. v. Ueltschi's Admr. 556
Louisville Gunning System v. Parks 532
McCarley's Exr. a. Black 825
McClure's Exr. v. King, &c. 675
McCoy's Admr. v. McCoy 783
Madison Natl. Bank a. Patton 469

Digitized by Google

Madisonville, H. & E. R. R. Co. v. Ross 138
Makibbin's G'd'n a. Trustees Speers' Mem. Hospital 17
Mason & Hoge Co. a. L. & N. R. R. Co. 844
Metropolitan Life Ins. Co. v. Ford 49
Meyers v. Dunn 548
Mink a. L. & N. R. R. Co. 337
Moberly v. Richmond Telephone Co. 369
Moreland a. Cresapeake Stone Co. 606
Moss, Circuit Judge, a. Brown 833
Mounts v. Murphy 803
Mt. Olivet, Town of, a. Wells 131
Mt. Sterling, City, v. King 526
Murphy a. Mounts 803
Musscllam v. C n., N. O. & T. P. Ry. Co. 500
Newton, &c., v. Ogden, &c. 101
Nunan a. Commonwealth 698
Ogden, &c., a. Newton 101
Paducah, City of, v. Jones, &c. 809
Parks a. Louisville Gunning System 522
Parrish v. L. & N. R. R. Co. .....
Parsons v. Breed 759
Pendleton's Admr. a. L. & N. R. R. Co. 605
Patton v. Madison Natl. Bank 469
Pittsburg, C., C. & St. L. Ry. Co. v. American Tob. Co. 582
Rader's Admx. v. L. & N. R. R. Co. 722
Raison, Jr., for Use, &c., a. Clark 486
Richmond Telp. Co. a. Moberly 369
Robinson, Norton & Co. v. Corsicana Cot. Fact. 75
Ross a. Madisonville H. & E. R. R. Co. 138
Ryan's Exr. a. Commonwealth, ex rel Cummings, Sheriff.....649
Samuels & Co. a. Edelen, &c. 295
Saulsberry a. Chesapeake & Ohio Ry. Co. 179
Sebree v. Thompson 223
Sheegog's Admr. a. Ill Cent. Ry. Co. 252
Shelbyville, City of, a. Carrithers, &c. 769
Simpson v. Commonwealth 441
Skidmore v. Cumb. Valley Land Co., &c. 576
Slaughter a. Trustees Cin. Southern Ry. Co. 492
Solliger a. Commonwealth 66
So. Cov. & Cin. St. Ry. Co. a. Eichman's Committee.....519
Spaulding, &c., v. Grundy 510
Spinks a. U. S. Life Ins. Co. 405
Standard Oil Co. a. Berger 155
Steele a. Commonwealth 670
Stegeman v. Cook 114

Digitized by Google

Sturges, &c., v. Sturges, &c. 80
Thompson a. Sebree 223
Tilford, Bldg. Inspector, v. Belknap 244
Town of Mt. Olivet a. Wells 131
Trustee Cin. Southern Ry. Co. v. Slaughter 492
Trustee School Dist. 54 v. Gividen, Supt., &c. 194
Trustee Spears' Mem. Hospital v. Makibbin's G'd'n 17
Tye a. Wilson 34
U. S. Fidelity & Guaranty Co. v. Growberger, &c. 118
U. S. Life Ins. Co. v. Spinks 405
Ueltschi's Admr. a. L. & N. R. R. Co. 556
Wade's Admr. a. Commonwealth, for Use, &c. 791
Walton a. Commonwealth 523
Ware v. Hager, Auditor 324
Warren's Admr. v. Warren, &c. 692
Wathen a. Commonwealth, by, &c. 573
Weisenburg, &c., a. Commonwealth 8
Wells v. Town of Mt. Olivet 131
Western Mfg. Co. v. Cotton & Long 749
Western Union Telg. Co. v. Caldwell 42
Widows' & Orphans' Home of O. F. v. Commonwealth 386
Wilson v. Tye 34
Wren's Exr. v. Wren's Extx. 704
Young v. Commonwealth 474

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DECISIONS

OF THE

COURT OF APPEALS OF KENTUCKY

APRIL TERM, 1907

CASE 1.—ACTION BY ROY HOBBS AGAINST LOUISVILLE H. & ST. L. RY CO. INVOLVING THE RIGHT OF THE PLAINTIFF, AFTER DISMISSING HIS ACTION WITHOUT PREJUDICE, TO INSTITUTE ANOTHER WITHOUT PAYING THE COSTS OF THE FIRST ACTION.—May 30.

Hobbs v. L., H. & St. L. Ry. Co.

Appeal from Henderson Circuit Court.

J. W. HENSON, Circuit Judge.

From a judgment of dismissal plaintiff appeals. Reversed.

Costs—Stay of Subsequent Action Until Payment.—Under Ky. St. 1903, sec. 884, authorizing a resident poor person to prosecute an action without paying costs, where such a person dismissed an action without prejudice, he may maintain another action upon the same cause without paying the costs awarded against him in the former action; it not appearing the dismissal was intended to harass defendant or burden it with unnecessary costs.

DORSEY & STANLEY for appellants.

POINTS AND AUTHORITIES CITED.

1. If there was ever a case that will appeal to or touch the heart of a court it seems to us it is the case at bar. Here is a boy fifteen years old, delicate, weak, with his arm amputated, unable to work, who sues by his father and next friend, who is totally blind and without a dollar in the world, and yet they are

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turned out of court because they are unable to pay a railroad company the sum of $47.55. We do not believe this is the law, and we will not believe it until this rule is established and fixed by this court.

2. No disposition is shown upon the part of this appellant to annoy or worry or to nag this railroad company, but he has simply in a quiet, unostensible way, proceeded to secure his rights as he understands them, and because he has seen fit to dismiss this suit without prejudice once, he has the temples of justice shut in his face and is told to raise $47.55 for the railroad company or get out of court. We don't believe this is law, and we consequently ask and expect at your hands a reversal of this cause.

Civil Code, sec. 37, 616-17-18 and 19; Ky. Stats., sec. 884; Westerfield vs. Wilson, 12th Bush, 125; Richardson vs. Hunt, 5 Ky. Law Rep., 931.

HELM & HELM for appellee.

The motion to stay proceedings in a second suit on the same cause of action is of great antiquity, having early arisen in the English courts in actions of ejectment, where one judgment was not a bar or res adjudicata in subsequent suits to try the same title. Even in ejectment suits the action of the court in staying proceedings was put upon equitable grounds: First, to prevent the process of the court and the courts themselves being made a means of oppression and extortion, by compelling those asking justice to be equitable and make whole a defendant needlessly subjected to court costs; and second, it was declared contrary to both equitable principles and the common law to permit vexatious and repeated litigation. And unless clear grounds to the contrary were shown, there was an almost conclusive presumption that a second suit on the same cause of action and between the same parties was vexatious. The court has doubtless had the experience, or at least observed the practice of persons presenting a claim, saying, "You can better afford to pay this claim than stand the court costs;" and it is undoubtedly true that a great many claims of all kinds are settled simply for fear that the court costs, which it is the right of a citizen to impose upon another, will exceed the amount in controversy, or for which the controversy can be settled. It is obvious that if the practice is permitted of an insolvent and impecunious plaintiff "litigating and relitigating and experimenting and re-experimenting" at the cost of the defendant. and with immunity to himself, that the plaintiff in such cases has a tremendous leverage upon and advantage of a defendant when the claim presented is small. It

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certainly can not be in accord with the policy of the law of the State to encourage or assist or even to acquiesce in the use of the processes of the court as a means of intimidation or extortion.

AUTHORITIES CITED.

Civil Code, sections 687, 113, subsections 5 and 8, section 737, subsection 11; Encyclopedia of Law and Procedure, vol. 11, (Cyc.) page 255; Sooy v. McKean, etc., 9 N. J. Law, 886; Buckles v. Chicago M. & St. P. R. Co., the Federal Court for the Western District of Missouri (September, 1891), 47 Federal, 424; Supreme Court of New York in Perkins v. Hinman, 19 Johnson's Rep. 237; 3 Cowan, 381, 27 Howards Practice, 156, 3 Abbott's Practice, 365, 5 Duer, 688; Saxton v. Stowell, 11 Paige (N. Y.) 526; Robbins v. Merchants' and Miners' Transportation Co., 116 R. I. 227, 14 Atl. Rep. 860; Schwebe v. Hemrich, 69 Pac. Rep. 643; Matthews in the Supreme Court of Ala. (February, 1906), 40 So. Rep., 78; Henderson v. Griffith, 5 Pet. (U. S.) 151; Gerrish v. Pratt, 6 Minn. 56; State v. Howe, 64 Ind., 18; Fleming v. Penn. Ins. Co., 4 Pa. Stats., 475; Langsdon v. Marks, 86 Ga., 435; McIntosh v. Hoban, 11 Wis., 400.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

The only question involved in this case is whether or not a party who has dismissed without prejudice his action will be allowed to maintain another suit upon the same cause against the same parties until he has satisfied the costs adjudged against him in the dismissed action. The appellant—for what reason the record does not disclose—dismissed without prejudice an action brought against appellee, and soon afterwards instituted another based on the same cause. In the action that was dismissed appellee recovered judgment for $47, its costs in that suit expended. When the second action came up for pleading, motion was made by appellee that appellant, the plaintiff therein, be required to pay by a day certain this cost, on pain of dismissal of his action. Uncon-

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troverted affidavits were filed by the plaintiff showing that he could not pay the costs, and he asked to be permitted to prosecute the second action in forma pauperis; but the lower court ruled that the costs must be paid, and upon his failure to pay them dismissed the action.

We have no statute covering a question like this, nor has it heretofore been brought to the attention of this court. But in many of the state and federal courts it is not unusual to pursue the course adopted by the lower court. In volume 11 of Cyc., at page 255, speaking of this practice, it is said: "The court may, and ordinarily will, stay proceedings in a second action, legal or equitable, between the same parties, for the same cause of action, until the costs of the first action are paid. This is true, irrespective of the manner in which the action terminates, as where the plaintiff is nonsuited, or where he dismisses or discontinues his action, or takes a voluntary nonsuit, or the suit is dismissed for failure of the plaintiff to state a cause of action, or where the complaint is dismissed for failure to pay the costs imposed on opening a default. But the rule does not apply where the second suit is rendered necessary by the act of the defendant himself, as, for instance, by defendant's fraud or perjury in procuring a nonsuit, where the cause of abatement is the death of the party, or where the former suit was dismissed through the attorney's neglect." Where this rule obtains, proceedings in the second action are stayed to a day when the costs of the first suit must be paid, and, if not paid within the designated time, the action will be dismissed; and in these jurisdictions the power is said to be sparingly exercised in the sound discretion of the court, and finds its support in the theory

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that it tends to prevent the vexatious multiplication of suits. In the case before us it does not appear that in dismissing his action the plaintiff was actuated by a purpose to harass or annoy or burden the defendant with unnecessary costs; and, as it is apparent that he was unable to pay the costs of the first suit, it would be exercising arbitrary power to deny the right to institute a second suit, and thereby prevent him from prosecuting a meritorious claim.

We do not mean to hold that trial courts, in the exercise of a reasonable discretion over parties and proceedings, to the end that justice may be promoted, will not under any state of case be permitted to require the plaintiff to pay the costs of an action unnecessarily dismissed with the apparent design of subjecting his adversary to unreasonable trouble and expense or to lay down any rule that will prevent the court, in the exercise of a sound discretion, upon a proper showing, from requiring a party, as a condition precedent to maintaining a second action, to pay the costs of the former one between the same parties. But it is certainly not the purpose of our laws, and has never been the practice in this state, to impose upon its citizens burdens that would prohibit them from appealing to the courts to protect their rights or redress their wrongs. The courts are open to the poor as well as to the rich, and, subject to reasonable statutory regulations, every person has the right to prosecute actions for injury done to his person, property, or reputation, and, in the language of the Bill of Rights, "to have remedy by due course of law and right and justice administered without sale, denial or delay." To uphold the ruling of the lower court would be violative of this principle and in conflict with section 884 of the Kentucky Statutes of 1903,

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providing that "a poor person residing in this state may be allowed by a court to prosecute or defend an action therein without paying costs; whereupon he shall have any counsel that the court may assign him, and from all officers all needful services and process without any fees, except such as may be included in the costs recovered from the opposite party." In Westerfield v. Wilson, 12 Bush, 125, it was held that a poor infant and his insolvent next friend may be permitted to prosecute an action without giving security for costs, although section 619 of the Civil Code of Practice provides that, "a guardian, curator or next friend, suing for a person under disability, * * * when insolvent, may be required to give security for costs, and on failure to do so in a reasonable time after it is directed by the court, upon motion of the defendant, his action shall be dismissed"—saying: "If the infant plaintiff, by reason of her poverty and want of legal capacity to indemnify those against loss who might be willing to offer their services as next friend, is unable to furnish the name of a solvent party liable for costs, the greater the necessity for permitting those in such a helpless condition to avail themselves of the provisions of the statute. Any other construction of this law would preclude infants, however great the wrongs committed upon their persons or property, from maintaining an action, unless their next friend or guardian was able to pay the costs. The section of the statute gives to the court a discretion in permitting or refusing the application to prosecute or defend an action without the payment of costs. Still this discretion is not arbitrary; and upon a state of facts showing the right of the party to maintain the action and the grounds for a recovery, nothing else appearing, it is the duty of the court to

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permit the prosecution of the action without the payment of costs."

There is no substantial difference between dismissing an action because the party is unable to secure the costs, and dismissing it because he cannot pay the costs of a former action, dismissed for sufficient reasons, and not with the design of vexatiously annoying his adversary. The enforcement of the arbitrary practice adopted by the lower court would in many instances prevent a poor person from obtaining relief to which he might be justly entitled, and deny him that equality before the law that is the boast of our system of jurisprudence.

Wherefore the judgment of the lower court is reversed, with directions to proceed in conformity with this opinion.

Petition for rehearing by appellant overruled.

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CASE 2.—PROSECUTION AGAINST JOHN WEISENBURG AND OTHERS FOR VIOLATING THE LOCAL OPTION LAW.—May 30.

Comonwealth v. Weisenburg, Etc.

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Appeal from Breckenridge Circuit Court.

WEED S. CHELF, Circuit Judge.

From a judgment dismissing the prosecution the commonwealth appeals—Reversed.

1.—Intoxica'ing Liquors—Local Option—Submission to Popular Vote—Contest—Appeal—Supersedeas—Operation and Effect. —An election under the local option law was held in a city in which the sale of intoxicating liquors had previously been prohibited. The election resulted in favor of the sale of liquor. A contest of the election was dismissed by the contest board and an appeal taken to the circuit court, which declared the election void. After the contest board had dismissed the contest, and before the appeal was prosecuted to the circuit court, the city issued a license to retail liquors. The judgment of the circuit court declaring the election void was superseded, and an appeal taken to the Court of Appeals. Held, that the supersedeas which suspended the efficacy of the judgment left affairs in the same condition they were just before the judgment was rendered, and the privilege of the licensees to conduct their business under the license was not interfered with duri g the life of the license or until the appeal was disposed of.

2. Same—Local Option—Election—Statutory Provisions.—Ky. Stats., 1903, section 2556, provides that after a local option election the canvassing board shall certify the result to the clerk of the county court, the judge shall have it spread on the order book of his court, and it shall be prima facie evidence in any proceeding under the act. Section 2557 provides that after the entry of the certificate, if the vote was against the sale, etc., of liquors, it shall be unlawful to sell the same. Section 2566 provides that, when notice of a con-

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test of the election shall be executed on the county judge, the certificate shall not be record . Held, that where an election was had in a territory in whic the sale of intoxicating liquors had previously been prohibited, resulting in favor of the sale, but a contest was had, and the certificate was not recorded, the city authorities had no authority to issue a license to sell intoxicating liquors, since, the election having changed the status of the territory, it was necessary that the certificat be recorded in order that the election might become effective.

J. R. LAYMAN, Commonwealth's Attorney for appellant.

N. B. HAYS, Attorney General, and C. H. MORRIS, of counsel.

We think this court should reverse the lower court for the following reasons:

1. There should have been a judgment of "guilty" or "not guilty." The appellees were either guilty or innocent, and the subsequent action of the Court of Appeals can not and will not affect their past acts so as to make that which is not now a violation of law punishable by a fine. We do not think a judgment holding that a prosecution is "premature" when it is for an act previously committed can with reason be sustained.

2. There having been no special registration as required by section 1495, Ky. Stats., and chapter 6, page 21, Acts 1904, the election was invalid and of no effect. This court said in the case of Earley v. Raines, 89 S. W. 289, that the requirement of section 1495, Ky. Stats., applies in every "special election held in cities and towns in this Commonwealth whether such city or town, or any part thereof, is voting alone or in connection with other.

3. We very earnestly insist that the sale herein complained of was also in violation of law and without right because the certificate of the result of the election had not been and is not now spread on the order book of the county court of Breckenridge county. The only certificate on the order book being the one showing the local option law to be in force in the magisterial district, which fact the agreed statement shows.

CITATIONS.

L. & N. R. R. Co. v. Com'lth, 66 S. W., 505; Ford v. Moss, 98 S. W., 1015; Ball v. Com'lth, 98 S. W., 326; Shindler, county judge v. Floyd, 81 S. W., 668; Edwin v. Benton, 87 S. W., 291;

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Cole v. Com'lth, 98 S. W., 1002; Com'lth v. Hoke, 14 Bush, 668; Young v. Com'lth, 14 Bush, 161.

MURRAY & MURRAY, for appellees.

STATEMENT OF APPELLEES CONTENTIONS IN THIS CASE.

1. The appellees are licensed dealers in spirituous, etc., liquors, and have been since the 10th day of July, 1906.

2. That the judgment of the circuit court sustaining the jurisdiction of the contest board was suspended by the appeal of O. De Haven, etc.; that said decision is not now in force, and was not after the execution of the said supersedeas bond by the contestees O. De Haven, etc.

3. No prosecution for the violation of the local option law will lie against the appellees until at least after the final decision of this court on said contest. We can not conceive that the contestants and contestees, by an agreement among themselves can bind the appellees until that agreement becomes the judgment of the court. It does not become res adjudicata until the court adjudges the matter.

AUTHORITIES CITED.

Ky. Stats., sections 2556, 2557, 2561, 4197; also section 16, article 5, chapter 92, Gen. Stats.; Adams v. Stephens, 38 Ky., page 443; Runyan v. Bennett, 4th Dana, page 598; Locke v. Com'lth, 113, Ky., page 164.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

In February, 1907, the commonwealth's attorney for the ninth judicial district filed information under section 1141 of the Kentucky Statutes of 1903 against appellees, charging them with a violation of the local option law, alleged to be in force in Cloverport magisterial district of Breckinridge county. The prosecutions being heard upon an agreed state of facts, judgment was rendered dismissing it upon the ground that it was prematurely instituted. The agreed facts are as follows: Previous to May, 1906, the sale of in-

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toxicating liquors was prohibited in Cloverport magisterial district, composed of election precincts Nos. 1, 2, and 3. An election under the local option law was ordered to be held in these precincts on the 5th day of May, 1906. The certificate of the board that canvassed the returns of election showed that a majority of the voters in precincts Nos. 1 and 2 voted in favor of the sale of liquors, whilst in precinct No. 3 a majority opposed it. The certificate of the board of election commissioners stating the result in precincts Nos. 1 and 2 was not spread on the records of the Breckenridge county court, because notice of contest was given. On the 17th day of May, 1906, notice of contest in precincts 1 and 2 was presented to the county judge and the two justices of the peace residing nearest to the courthouse, asking that the election be declared invalid for the reasons stated in the notice. The contest coming on for trial on June 26th, the contest board held that they had no jurisdiction, and dismissed the contest. On August 10th an appeal was taken from the decision of the contest board to the circuit court. The circuit court in January, 1907, entered a judgment holding that the election in precinct No. 1 was void. After the contest board decided that it had no jurisdiction of the contest, and before the appeal was prosecuted to the circuit court, the city authorities of Cloverport issued to appellees a license to retail liquors from the 10th day of July, 1906, for the period of one year and on that day appellees paid to the clerk of the county court of Breckinridge county the State tax. On January 3, 1907, the contestees in the contested election case superseded the judgment of the circuit court declaring the election void, and prosecuted an appeal to this court. The

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judgment of the lower court on that appeal has been affirmed.

The only question to be decided is, did the license issued by the proper authorities to appellees protect them? It is contended for appellant that the decision of the circuit court holding the election void subjected appellees thereafter to the penalty denounced by law for selling liquor in local option precincts, although the judgment was superseded pending an appeal to this court, and, further, that without reference to the judgment of the circuit court the right to sell liquor in these precincts, although a majority of the voters favored the sale, did not become effective, because the certificate of the result of the election was not spread on the order book of the county court. Appellees insist that when the license was issued the authorities had the right to grant it, as there was at that time no law in force in the territory prohibiting the issual of licenses, nor was any proceeding pending to contest the election under which the right to grant license was authorized, and that the appeal and supersedeas suspended the judgment of the circuit court declaring the election void. If the authorities had the legal right to issue license, the judgment of the circuit court annulling the election would not, pending the appeal, affect the rights of licensees. The license was issued for the period of one year, but the right to operate under it was subject to be taken away at any time by final adjudication that the election was void. If the election during the life of the license had been set aside by the judgment of this court, or the judgment of an inferior tribunal or court from which no appeal was prosecuted, the decision would relate back to and restore the status that existed immediately preceding the elec-

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tion; and in such event the local option law in force prior to May, 1906, would have continued in operation, and therefore the sale of liquor would have been illegal, notwithstanding the license. But the law allows all appealable orders to be superseded and suspended pending an appeal; and when the judgment of the circuit court declaring the election void was appealed from, and its operation and effect suspended by the execution of a supersedeas bond and the issual of an order of supersedeas, the effect was to leave affairs in the same condition they were just before the judgment was entered. Speaking of the effect of a supersedeas, this court in Runyon v. Bennett, 4 Dana, 598, 29 Am. Dec. 431, said: "A supersedeas suspends the efficacy of a judgment, but does not, like a reversal, annul the judgment itself. Its objects and effect are to stay future proceedings, not to undo what is already done. A consequence of this is that whatever is done under the judgment, after and while it is superseded, being done without authority from the judgment, which is then powerless, and against the authority and mandate of the supersedeas, should be set aside as improperly and irregularly done." To the same effect are Webber v. Tanner, 64 S. W. 741, 23 Ky. Law Rep. 1107, and Hey v. Hardin, 78 S. W. 136, 25 Ky. Law Rep. 1454. Therefore the judgment of the circuit court, which was rendered inoperative for the time being by an appeal and supersedeas, preserved the status existing before the judgment was rendered, and did not annul or interfere with the privilege of appellees to conduct their business under the license, if it gave them such right; and this continued during the life of the license, or until the appeal was disposed of by this court, and its judgment had become final.

A more serious question is presented in the argu-

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ment that it was necessary to spread upon the order book of the county court the certificate showing the result of the election before it became effective in the territory in which the vote was taken, and that when an election is contested it forbids entering the order on the records of the county court until the contest is disposed of. Section 2556 of the Kentucky Statutes of 1903 provides that: "If it shall be found that a majority of the legal votes cast at any election herein provided for were given for or against the sale, barter or loan of spirituous, vinous or malt liquors, * * * it shall be the duty of the canvassing board to certify that fact, which certificate shall be delivered to the clerk of the county court and by him safely kept until the next regular term of the county court, at which term the judge thereof shall have the same spread on the order book of his court, and said entry of the certificate in the order book, or a certified copy thereof, shall be prima facie evidence in any or all proceedings under this act." Section 2557 says that: "After the entry of the certificate of the canvassing board as above provided for in the order book of the county court, if the vote was given against the sale, barter or loan of spirituous, vinous or malt liquors, it shall be unlawful to sell, barter or loan the same." Section 2566, fixing the manner in which local option elections may be contested, provides that: "When a notice of the contest shall be executed on the county judge, the certificate shall not be recorded." The original local option law was an act of 1874, which remained in force without material change until 1894. Under it, it was not necessary to record the certificate of the result of the election on the order book of the county court, if a majority of the votes were cast in favor of the sale of liquor. The present law provides that the

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certificate shall be recorded, whether the majority is for or against the sale. If a vote is taken in a territory in which the sale of liquor is permitted, and the election results in a majority favoring the sale, we do not conceive that it would be indispensable to put the law into effect that the certificates should be recorded, because the status would not be changed by the election, but remain and continue as it had previous thereto. But when the election works a change in previous conditions, as where local option carries in a territory in which it had not previously been in force, or where there is a majority in favor of the sale of liquor in a territory in which the sale had been prohibited, then it is necessary that the certificate shall be recorded, and until the certificate is spread on the order book no prosecution for a violation of the local option law could be maintained, nor would it be permissible to issue license. In the case before us, the sale of liquor previous to the election in May, 1906, was prohibited. At the election, a majority being in favor of the sale, the status was changed, and therefore it was necessary that the certificate should be recorded in order that the election might become effective and authorize the proper authorities to grant license. When the license was issued to appellees, the only certificate on record was that certifying that the sale of liquor was prohibited. Until the certificate of the later election annulling the former one was spread on the order book, the certificate prohibiting the sale denied to any person the right to sell liquor in the territory; and, where the sale of liquor in a territory is prohibited, the issual of license authorizing the sale will be no protection to the person who receives it, as the authorities are without power to grant the license. That it was the legislative inten-

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tion that the condition in any given territory should not be changed by an election until the certificate was spread on the order book is, we think, made manifest by the provision that, "when a notice of contest shall be executed on the county judge, the certificate shall not be recorded." The purpose of this section was to preserve existing conditions until the contest was disposed of, and to prevent the sale of liquor in a territory in which before the election it had been prohibited until the result was finally determined in the contest proceedings. If it was not intended that recording the notice should be necessary to authorize the sale in cases where a majority voted in favor of the sale in territory in which the sale was prohibited, there would be no reason for denying to the county judge the right to record it pending the contest.

We therefore conclude that when an election is held in territory in which the sale of liquor is prohibited, and a majority of the votes are in favor of its sale, the result does not become effective until the certificate of election is recorded, and that, if the election is contested by persons opposing the sale in the manner provided in section 2566, the certificate cannot be recorded until the contest is disposed of. nor can any person sell within the territory until this is done. It results, from these views, that the judgment of the lower court must be reversed; and it is so ordered.

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CASE 3.—ACTION BY BINA E. SPEERS MAKIBBEN'S GUARDIAN, AGAINST THE TRUSTEES OF THE ELIZABETH SPEERS' MEMORIAL HOSPITAL AND OTHERS FOR CERTAIN MONEY ALLEGED TO BE DUE HIS WARD.—June 4.

Trustees Elizabeth Speers' Memorial Hospital v. Makibben's Guardian

Appeal from Campbell Circuit Court.

A. S. BERRY, Circuit Judge.

Judgment for plaintiff. Defendant appeals.—Affirmed.

1. Guardian and Ward—Actions—Parties—Allowance of Guardian's Compensation.—Where, after a suit was instituted by a guardian, the ward became of age and was joined as a plaintiff, the guardian was properly allowed to remain a party to the action and have his compensation for services as guardian allowed therein.
2. Wills—Construction—Estate in Trust—Capital and Income.—A testatrix bequeathed to her adopted daughter "a sum of money sufficient for her support and education until she marries or arrives at the age of 21 years * * * and I direct my executors * * * to set apart out of my estate * * * $10,000 for that purpose. Any balance that may remain of said fund after the execution of said purpose shall become a part of my general estate." Held, that the executors were not confined to the income of the fund, but were authorized to use the entire fund for the support and education of the ward.
3. Guardian and Ward—Compensation—Payment.—Where compensation was promised a guardian by the executors before his services incident to the education and maintenance of the ward were performed, it was proper to order its payment out of the fund provided for the ward's support and education.

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HODGE & WOLFF and J. C. WRIGHT for appellants.

C. T. BAKER for appellees.

OPINION OF THE COURT BY JUDGE SETTLE.—Affirming.

Elizabeth L. Spears, of Campbell county, Ky., died in 1894, leaving an estate of the value of $200,000. She also left a will by which, after certain specific bequests,, the residue and bulk of her estate was devised to her executors, in trust for the erection and endowment of an eleemosynary institution, in or near the city of Newport, to be called the "Elizabeth Speers Memorial Hospital." The hospital was established by the trustees soon after the death of the testatrix, and has ever since been maintained, as required by her will. Among the special bequests made by Mrs. Speers' will were the following:

"I give and bequeath to Bina Elizabeth Speers Makibben the sum of $10,000.00 to be paid to her when she arrives at the age of twenty-one years; said money to remain in the hands of my executors until she arrives at said age and she is to have no interest in the same unless she does arrive at said age."

"I also give and bequeath to said Bina Elizabeth Speers Makibben a sum of money sufficient for her support and education until she marries or arrives at the age of twenty-one years, whichever event first happens; and I direct my executors hereinafter named to set apart out of my estate the sum of $10,000.00 for that purpose. Any balance that may remain of said fund after the execution of said purpose shall become a part of my general estate. Said money is to remain in the hands and under the control of my executors, and no part of the same is to be paid at any time to

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any statutory or other guardian she may have; but the guardian may, if he so desires, at any time have the custody of her person . By support I mean boarding and clothing also."

Bina Elizabeth Speers Makibben, when quite young, became the legally adopted child of Mrs. Speers, and lived with and was cared for by the latter for eight years before her death, which occurred when the child was ten years of age. During those eight years Mrs. Speers clothed, schooled, and maintained Bina at her own expense, bestowing on her all the affection and care that a devoted mother would manifest for her own daughter. Indeed, all the wants of the child were generously supplied. She was given lessons in music and taught other accomplishments that appertain to those who are accustomed to move in the best social circles; it being the evident purpose of Mrs. Speers to spare neither time nor money in fitting her for the station in life she designed her to occupy and otherwise ministering to her happiness. Having had the care of Bina so long, Mrs. Speers must be presumed to have learned what it would cost to properly support her during the years of her minority and complete her education. With all this in mind, she bequeathed to her executors, for the support and education of her adopted daughter, $10,000, in addition to the $10,000 they were directed by the will to pay her upon her arrival at 21 years of age. The father of Bina died before her adoption by Mrs. Speers. From his estate she received $2,500 in money, which went into the hands of her statutory guardian, one Charles W. Nagel, in whose care and custody she remained from the death of Mrs. Speers until she became 21 years old.

The guardian caused her to be carefully educated,

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sending her to a female college at Winchester, Ky., and to a college at Oxford, Ohio, and during her minority clothed and otherwise provided for her in a manner comporting with her station in life. The cost of thus educating and maintaining his ward required an average expenditure of not less than $930 per year, or a total of $8,064 for nine years. These expenditures for and on her account were paid by the executors of Mrs. Speers out of the $10,000 set apart by her will for that purpose. Because of objection on the part of the trustees of the Speers Hospital, the executors after October, 1904, refused to apply any more of this fund to the support or education of Bina Elizabeth Speers Makibben, and this action was instituted by the guardian, August 11, 1905, to recover of them, for the ward's benefit, the sum of $865.04, alleged to have been expended by him as guardian for her board, clothing, and education October 1, 1904, and June 1, 1905. The trustees of the Speers Hospital were also made parties to the action as defendants because of the provisions of Mrs. Speers' will, which requires what may be left of the $10,000 set apart for the support and education of Bina Makibben to become a part of her general estate, and devoted to the maintenance of the Speers Hospital.

Before appellants filed answer to the petition. the guardian filed an amended petition, setting up an additional claim of $99.64 for expenditures made for the support of his ward from June 1 to August 1, 1905, and for this additional amount judgment was also asked against the executors. It was also averred in the amended petition that the ward became 21 years of age shortly after the institution of the action. By another amended petition, later filed, the plaintiff

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asked judgment against the executors for the further sum of $557.22, claimed as compensation due the guardian at the rate of $50 per year between the date of Mrs. Speers' death and that of the arrival of his ward at the age of 21 years for labor and service performed by him in caring for his ward, supervising her expenditures, and liquidating her bills; it being averred that the labor and services were performed and rendered at the request of and by agreement with the executors, and that the compensation claimed had been allowed by the judge of the Campbell county court. By yet another amended petition it was again alleged that Bina E. S. Makibben became 21 years of age shortly after the institution of the action; that she adopted the averments of the original and amended petitions, and in her own right joined in the prayer of each for the relief sought. Special and general demurrers were filed to the petition as amended, by the trustees of the Speers Hospital, both of which were overruled. Thereafter, on motion of appellees, the action was dismissed as to the trustees of the Speers Hospital.

The special demurrer raised the question of the guardian's capacity to sue. It was properly overruled. When the action was instituted the ward was still an infant, and, this being true, the action had to be brought by the guardian. The ward was properly joined as a plaintiff, and when later she became 21 years of age she had the right to unite in the action and participate in the further prosecution of the case in her own right as she was permitted to do. That fact, however, did not require the dismissal of the guardian from the action, or exclude him from having determined therein the question of his compensation for services rendered his ward or former ward. The

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action having been properly commenced by him as guardian, and his right to the compensation therein claimed being asserted against the fund out of which she was entitled to be supported and educated, and being for services rendered in furtherance of the object for which the fund was provided, made it necessary to settle in the one case, and in connection with her claim against that fund, the question of whether his services should be paid out of the same fund. Moreover, he had not, previous to the institution of the action made a final settlement of his accounts as guardian, and the matter of his compensation had to be determined before a final settlement with his ward could be made by him. Under such circumstances he was not required to bring a separate action for the compensation claimed by him.

The general demurrer filed by the trustees of the Speers Hospital was also properly overruled, for the petition states a good cause of action. The claim it asserts is sustained by the provisions of Mrs. Speers' will. The answer of the executors admits Bina E. S. Makibben's right to be supported and educated out of the fund set apart by the will for that purpose, and it does not deny the correctness of the claims upon which she and the guardian sue. The answer gives, as a reason for the refusal of the executors to pay them as they had previously paid similar claims, that the trustees of the Speers Hospital objected to their doing so. Although the action had been dismissed by the court as to the trustees of the Speers Hospital, the answer of the executors was made a cross-petition against them, and to that they filed answer denying the authority of the executors to pay appellees' claim, or at any time to use more than the income of the fund provided by the will for the support and educa-

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tion of Bina Makibben. This pleading seems also to have been treated as an answer to appellees' petition as amended, for the latter filed a demurrer to it, which was sustained by the lower court.

The will of Mrs. Speers gives her adopted daughter a sum of money sufficient for her support and education until she arrives at 21 years of age, or marries, and directs her executors to set apart $10,000 which they are to hold and control for that purpose. It will be observed that the language of the will does not restrict the executors to the use of the income of this fund for the support and education of the beneficiary. On the contrary, they were directed to use for her support and education whatever part of it they might deem sufficient for the purpose, even the whole of it, if necessary. The only restriction is that they were not to use more than the $10,000 for her benefit. If the entire fund was not required for the support and education of the beneficiary, the will directs what shall be done with what remains. "Any balance that may remain of said fund after the execution of said purpose shall become a part of my general estate." This language of the testatrix indicates that she believed the whole of the fund would probably be consumed in maintaining and educating her adopted daughter. She intended that Bina should be liberally maintained and thoroughly educated, without encroaching upon the little patrimony of $2,500 in the hands of her guardian. Manifestly her affection and solicitude for Bina did not end with this provision for her support and education, for she added the further generous gift of $10,000, to be paid her upon reaching womanhood. The confidence of Mrs. Speers in the integrity and prudence of her executors is shown by the fact that the will requires of them neither bond or security for

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the performance of their duties. Having left the control of the fund for the support and education of Bina Makibben, and its appropriation to her needs, wholly in the hands and discretion of her executors, their application of it to her use for the purposes indicated by the will cannot be questioned by the trustees of the Speers Hospital, in the absence of a charge of bad faith or an abuse of the discretion on their part. The answer of the trustees contains no such charge, but merely alleges that the authority of the executors under the will went no farther than to expend the income of the fund in question for the support and education of the beneficiary. The answer presented no defense to the action. Therefore the demurrer to it was properly sustained. Nevell v. Dunaway, 86 S. W. 514, 27 Ky. Law Rep. 679.

It is alleged in the petition that the expenditures for which judgment was asked against the executors were such as they have repeatedly paid for the support and education of Bina Makibben, and that they were necessary and reasonable in price. This is not denied by the answer of the executors, and our examination of the accounts and vouchers satisfies us of its truth. We are of opinion, therefore, that in adjudging their payment out of the fund provided for that purpose by the will of Mrs. Speers the lower court did not err; hence we find no cause to disturb the judgment on the grounds, or any of them, urged by the executors and trustees of the hospital on this appeal. There is no question of the right of the executors to use the entire fund for such expenditures as appear to have been made for Bina Makibben, without regard to the small property received by her of her father's estate; and, in view of the generous provision made for her by the will of Mrs. Speer, we do

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not think it was incumbent upon the guardian to require her to earn any part of her support.

As to the claim of the guardian for compensation at the hands of the executors, it is sufficient to say that the services charged for were rendered at the instance of the executors and under an agreement made by them with the guardian that they would compensate him therefor. The services were such as had to be performed by some one for and on behalf of the ward. The executors could not perform them themselves. Manifestly they should have been rendered by some one sustaining a close relation to her, who would have been interested in her welfare, careful of her comfort, and prudent in the expenditures required. For these reasons no better agent could have been selected by the executors than the guardian. The services rendered should have been paid for out of the fund provided for the support and education of the ward. The charge is reasonable, and the claim was approved by the county court. For merely managing and investing the small amount received by his ward from her father's estate the guardian was compensated by the commission thereon allowed by law; but such commission was wholly inadequate to compensate him for services rendered the ward and executors in carrying out the provisions of Mrs. Speers' will with respect to her maintenance and education. As compensation to the guardian for the services in question was promised by the executors in advance of their performance, and the expense, in our opinion, should be paid out of the fund provided for the support and education of the ward, it was not error for the court below to allow it.

The conclusions so far expressed in the opinion relieve us of the necessity of passing on other ques-

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tions presented by the appeal.

Judgment affirmed.

Petition for rehearing by appellants overruled.

CASE 4.—ACTION BETWEEN THE CITY OF COVINGTON AND JOHN DALHEIM AND OTHERS TO TEST THE VALIDITY OF AN ORDINANCE TAXING OCCUPATIONS.—June 4.

City of Covington v. Dalheim, Etc.

Appeal from Kenton Circuit Court.

W. McD. SHAW, Circuit Judge.

From the judgment the city appeals.—Affirmed.

1. Licenses—Occupation Tax — Grocers — Uniformity. — Under Const. section 181, allowing license taxes on trades, occupations, etc., and Ky. Stats., 1903, section 3058, subsection 2, authorizing cities of the second class to tax grocers, etc., the tax must apply to all grocers in a city; and hence an ordinance levying a tax on grocers only who employ delivery wagons is invalid.
2. Same—Vehicles.—Ky. Stats., 1903, section 3058, subsection 2, authorizing cities of the second class to license and tax cabs, wagons, etc., and "all other vehicles used or let for hire," does not authorize a city to tax delivery wagons used by grocers.

C. J. HANLON, city solicitor, for appellant.

CITATIONS.

CONSTRUCTION OF ORDINANCE IN QUESTION.

Jung Brewing Co. v. City of Frankfort, 18, Ky. Law Rep., page

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855; City of Covington v. Woods, etc., 98 Ky. Rep., pages 346, 347; First Dillon on Municipal Corporations, section 420, page 486; Baltimore v. Clunet, 23 Md., page 449; Martindale v. Palmer, 52 Ind., 411; Amer. and Eng. Enc. of Law, second edition, vol. 21, pages 977, 978 and cases cited in foot notes; City of Covington v. Herzog, 25 Ky. Law Rep., pages 938, 939; Com'lth v. Laundry Co., 105 Ky., 257; Crossdale v. Cynthiana, 21 Law Rep., page 36; Evers v. City of Mayfield, 27 Ky. Law Rep., 481; West v. City of Mt. Sterling, 23 Ky. Law Rep., 1670; City of Carlisle v. Heckinger & Co., 20 Ky. Law Rep., 74; Town of Pikeville v. Hoffman, 23 Ky. Law Rep., 1692.

H. D. GREGORY and GREENE & VANWINKLE for appellee.

AUTHORITIES CITED FOR APPELLEES.

Ky. Stats., section 3058; Ky. Const., section 181; City of Covington v. Woods, etc., 98 Ky., 347; Kansas City v. Grust, 151 Mo. 128; McGraw v. Town of Marion, 98 Ky., 673.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

This action tests the validity of the following ordinance enacted by the common council of the city of Covington:

"An ordinance to license and regulate the grocery business within the city of Covington, Kentucky.

"Grocer Wagon License.

"Sec. 409. (1) Be it ordained by the general council of the city of Covington, Kentucky, that it shall be unlawful for any person, firm or corporation to engage in or transact any business as a grocer within the city of Covington, Kentucky, without obtaining a license so to do.

"License Fees.

"Sec. 410. (2) Be it further ordained, that the amount to be paid for said license per annum is five dollars ($5.00) for each one-horse wagon, seven and

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fifty one-hundredths ($7.50) dollars for each two-horse wagon, and ten ($10.00) for each three-horse wagon used in said business.

"Fire Fund.

"Sec. 411. (3) Be it further ordained, that all money collected under this ordinance shall be for the benefit of the fire fund.

"Penalty.

"Sec. 412. (4) Be it further ordained, that any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction in the police court be fined not less than five dollars ($5.00) nor more than twenty-five ($25.00) dollars and costs of prosecution for each offense."

The constitution allows a license tax to be imposed on trades, occupations, and professions. Section 181, Const. In pursuance of that power, the legislature has authorized second-class cities (to which Covington belongs) to impose license taxes as follows: Subsection 2, section 3058, Ky. St., 1903: "To license, tax and regulate undertakers, auctioneers, grocers, merchants, bakers, * * * livery, board, feed and sale stables, hansoms, cabs, hackney coaches, carriages, barouches, buggies, wagons, omnibuses, carts, drays, job-wagons, and all other vehicles used or let for hire. * * *" The ordinance set forth above was enacted in virtue of the power delegated by sections 3058 of the Kentucky Statutes of 1903. Appellants are grocers, who use delivery wagons in their business to deliver goods free of charge for the service to their customers. The wagons are not let for hire. Nor are grocers who do not use delivery wagons taxed at all on their occupations.

It is competent for the city to select any of the

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enumerated classes as subjects for license taxes. But on stock used for breeding purposes, on franchises, it is not competent for it to tax some members of a class set apart by the legislature and not tax others of the same class. That would not be uniform taxation and would be repugnant to the Constitution. The grant of power to the city is to tax by license certain specific trades or callings, which the legislature has itself classified. If grocers are to be taxed, all grocers must be taxed. To be sure, the tax may be graded upon any natural and reasonable basis, as, for example, upon the amount of sales or character of stock of merchandise kept, or, for that matter, by the number of delivery wagons employed, so long as all are taxed upon the occupation of grocers. But this ordinance does not impose a license on all grocers. True, it says that it does; but, as no provision is made for collecting licenses from any grocers, except those who employ delivery wagons, it follows that all who did not employ delivery wagons are not required to pay any license tax. This of itself is not uniform taxation. Kansas City v. Grush, 151 Mo. 128, 52 S. W. 286.

We agree, also, with the circuit court, that the manifest purpose of the ordinance was not to tax grocers, but to tax delivery wagons used by grocers. In this the council was without power. The statute designates plainly what vehicles might be the subject of such tax; that is, such only as were used for hire. City of Covington v. Woods, 98 Ky. 347, 17 Ky. Law Rep. 927, 33 S. W. 84. It being conceded that the grocery delivery wagons were not used for hire, the city could not impose a license tax upon them either directly or indirectly. From a careful reading of the whole ordinance it is clear that its purpose was to tax vehicles used by

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grocers as delivery wagons, and not to impose the tax on anything else. The circuit court held the ordinance to be invalid, and in that we concur.

Judgment affirmed.

CASE 5.—ACTION BY THE COMMONWEALTH ON THE RELATION OF GEORGE H. ALEXANDER, REVENUE AGENT, AGAINST JOHN BACON, TO RECOVER TAXES ON OMITTED PROPERTY.—June 4.

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Commonwealth ex rel. Alexander v. Bacon

Appeal from Jefferson Circuit Court, Second Common Pleas Division.

THOS. R. GORDON, Judge.

Judgment for defendant. Plaintiff appeals.—Affirmed.

Judgment—Bar—Splitting Cause of Action—Taxation.—The omission of property from assessment in a given year gives rise to a single cause of action, and where an action has been brought to have the property assessed, and a judgment has been rendered therein, the judgment is conclusive as to all parties, and an action can not afterwards be brought to assess other property omitted from the same assessment which was not embraced in the first action.

M. J. HOLT, attorney for appellants.

POINTS OF LAW AND AUTHORITIES.

1. The State and not the revenue agent is the plaintiff, and no valid compromise in any action can be made without the consent of the party in interest. 25 Ky. Law Rep. 122.

2. The revenue agent can not compromise one of these pro-

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ceedings in such a manner as to preclude a further investigation or inquiry as to property not assessed. No hearing was had by the court and the court and not the revenue agent is the assessing officer. Const. 172, 52, 23 Ky. Law Rep. 390; 25 Ky. Law Rep. 2256.

3. The assessment made in the former proceeding does not preclude another assessment of other omitted property not assessed in the former proceeding.

4. In a proceeding under section 4241 of the Kentucky Statutes the court sits as an assessor, and not as a judge, and it is well settled that if property escapes one assessing officer another may assess it until all the property of the taxpayer is assessed. The action of this court is no more conclusive than the action of the assessor or board of supervisors. One proceeding does not preclude another until all the property of the taxpayer has been assessed for taxation. 88 Ky. 675; 84 Ky. 513-14. See kind of order entered "the Court shall enter an order," 4241 Ky. Stats.

5. When either the assessor or the board of supervisors of this court fixes the value of certain specified property that valuation is conclusive and to that extent only is one proceeding a bar to another proceeding under section 4241 of the Kentucky Statutes.

6. Section 4241 of the Kentucky Statutes should be construed liberally and in such manner as to accomplish the purpose of its enactment. L. & E. Mail Company v. Barbour, 88 Ky. 73.

R. C. KINKEAD, attorney for appellee.

POINTS OF LAW.

1. This action can not be maintained because of the entry of a judgment in a former action in the same court between the same parties for taxes for exactly the same years.

2. The record does not show that the judgment in the first action was in any wise a compromise of the proceeding.

3. The action of the court in the first suit insofar as it fixed the value of the property assessed and insofar as it determined that is was all the property omitted, was final.

5. The judgment in the first action can not be attacked in an entirely different proceeding, but only in the action in which it is entered.

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AUTHORITIES CITED.

Courier Journal Job Printing Co. v. Columbia Fire Ins. Co., 21 Ky. Law Rep. 1259; Lucas v. Com'lth, 28 Ky. Law Rep. 372; Belknap v. Com'lth, 28 Ky. Law Rep. 473; Cassidy Auditor's Agent v. Young County Judge, 92 Ky. 228; Com'lth v. Newell, 24 Ky. Law Rep. 1197; Baldwin v. Shine, 84 Ky. 502; Com'lth v. Morehead, 78 S. W. 1105; Com'lth v. Reed, 98 S. W. 2941; Com'lth v. Mitchell, etc., 99 S. W. 670.

OPINION OF THE COURT BY JUDGE HOBSON—Affirming

On April 1, 1905, A. J. Bizot, as revenue agent, instituted in the Jefferson county court proceedings in the name of the commonwealth of Kentucky against John Bacon to compel the listing for taxation of intangible personal property claimed to have been omitted from assessment for the years 1901, 1902, 1903, 1904 and 1905. The defendant filed an answer, and on May 26, 1905, a judgment was entered in the action by which personal property of the value of $3,750 was assessed to Bacon as omitted for each of the years 1901, 1902, 1903 and 1904, and $10,000 for the year 1905. Bacon paid the taxes and penalties as fixed by the judgment. In the meantime, on May 24th, this proceeding was instituted in the name of the commonwealth by George H. Alexander, as revenue agent, against the same defendant, seeking to have listed intangible personal property omitted from taxation for the same years. The statement filed in the second case is similar to that filed in the first case, except that it fixes the amount of the intangible property omitted from assessment at a larger figure than in the first case. The defendant pleaded the judgment rendered in the first suit in bar of the second. The county court sustained the plea and dis-

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missed the proceeding. The commonwealth appealed to the circuit court, who concurred in the judgment of the county court, and from this judgment the appeal before us is prosecuted.

It is insisted for the appellant that, if one assessing officer assesses a part of the taxpayer's property and omits a part of it, the part so omitted may be assessed by another assessing officer; that the county court, in making an assessment under section 4241, Ky. St. 1903, is simply an assessing officer, and, if in one proceeding a part of the defendant's property is omitted, the part so omitted may be assessed in another proceeding. We cannot concur in this view, for then, after this proceeding is tried, another revenue agent might bring a third suit on the ground that some of the defendant's property is still omitted from assessment, and so there would be no limit to the number of suits which the taxpayer might be called on to defend as to the assessment of his property. The proceeding under section 4241 is a proceeding by the commonwealth. The revenue agent is only the officer authorized to institute the proceeding. It is the commonwealth's suit. The commonwealth, like all other suitors, must in one action state its whole claim, and, when a recovery has been had in one action, there can be no other action based on the same cause of action. When the defendant is proceeded against in the county court to have property assessed which has been omitted from assessment for a given year, the court determines what property has been omitted from assessment, and the judgment, unless appealed from or vacated in some way, is equally binding both upon the commonwealth and upon the defendant. The statute does not contemplate a succession of suits under that section to list property

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omitted from assessment in a given year. The omission of property from a given assessment is the cause of action, and, when this cause of action is merged in a judgment, no other suit can be brought upon it while that judgment is in force, unless it is collusive.

Judgment affirmed.

CASE 6.—ACTION BY C. S. WILSON AGAINST RACHEL TYE, CONTESTING HER RIGHT TO HOLD THE OFFICE OF SUPERINTENDENT OF SCHOOLS, TO WHICH SHE WAS ELECTED OVER HIM.—June 4.

Wilson v. Tye

Appeal from Whitley Circuit Court.

VIRGIL P. SMITH, Special Judge.

Judgment of dismissal and plaintiff appeals—Affirmed.

1. Judgment—Conclusiveness—Election Contest.—A decision against an election contestant does not conclude him from asserting the contestee's ineligibility in a subsequent action to recover the office, where the Supreme Court on appeal in the contest refused to pass on that question.
2. Officer—Usurpers—Action to Remove—Who May Maintain.—Although Civil Code Practice section 483, authorizes the Commonwealth or a person entitled to an office to prevent usurpation by an action, and section 484 requires the Commonwealth's attorney to bring the action against a usurper of a county office, if no other person be entitled thereto, etc., and section 487 provides that on the removal of a usurper the person adjudged entitled thereto shall be placed in possession, if the action be instituted by him—one in possession

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of an office, though a usurper, may not be removed at the suit of another claimant unless such claimant shows himself entitled to the office.

3. Same—Schools and School Districts—County Superintendent—Tenure.—Under Kentucky Statute 1903, section 4401, fixing the tenure of the county superintendent of common schools until his successor is elected and qualified, and providing, in case of contest, the superintendent of public instruction may recognize one of the contestants as the officer until the contest is settled, the courts having decided contestee was elected over contestant and she having qualified, the State superintendent having recognized her right to the office, and contestant having surrendered the official records to her, he was excluded from the office and may not sue to remove her from office, though she be ineligible.

JOHNSON & SNYDER, attorneys for appellant.

Appellant contends that appellee is ineligible to hold the office of county superintendent of schools for two reasons:

1. She is a woman.

2. She was less than 24 years old on the first Monday in January, 1906, when the term of the office to which she claims to have been elected began.

3. Appellant is entitled to hold the office in question till an eligible successor ischosen.

AUTHORITIES CITED.

Ky. Stats., sections 3233, 3756, 4399, 4401, 4417, 4418, 4434, 4453, Civil Code chapter 13; Constitution of Kentucky, sections 72, 99, 228; Grinstead v. Scott, 82 Ky. 88; Wilson v. Tye, 92 S. W. 292; Atchison v. Lucas, 83 Ky. 451; Robinson's case, 41, Am. Rep. 244; Harbour Pitt Shoe Co. v Dixon, 60 S. W. 187; State v. Hostetter, 59, Am. State Rep. 515; Kirkpatrick v. Brownfield, 31 S. W. 137; Howard v. Cornett, 1 S. W. 1; Campbell v. Dotson, 63 S. W. 450; Hall v. Coulter, 78 S. W. 1110; Patterson v. Miller, 2 Met. 493; Com'lth v. Adams, 3 Met. 10.

TYE & DENHAM, attorneys for appellee.

QUESTIONS DISCUSSED AND AUTHORITIES CITED.

1. An usurper is one who seizes an office by force, actual or

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constructive, without color of right or title thereto. Palmer v. Com'lth, 29 Ky. Law Rep., at 220; Bouvier's Law Distionary; Mechem on Public Officers, section 320.

2. One who assumes the duties of an office upon receiving a certificate of election from the county board of election commissioners is not an usurper. Nall v. Coulter, 25 Ky. Law Rep., 1891.

3. A person does not have to be twenty-four years of age at the time of qualifying to be eligible to the office of county superintendent of common schools in this State. Constitution of Kentucky, section 100; Ky. Stats., sections 4399-4400; Acts of 1883-84, vol. 1 page 121.

4. The county superintendent of common schools is not required to qualify as such officer on the first Monday in January after election. Ky. Stats., sections 4399-4402.

5. A woman may hold an office of legislative creation in this State either by appointment or election. Ky. Stats., section 457;

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The parties to this action were opposing candidates for the office of superintendent of common schools for Whitley county, at the November election, 1905. Appellee was elected to the office over appellant by a majority of several hundred votes, and was duly awarded the certificate of election. Thereafter appellant, claiming to have been elected himself to the office, contested appellee's right thereto by suit in the Whitley circuit court. The contest was decided by that court in appellee's favor and on the appeal prosecuted by appellant from that judgment it was by this court affirmed. Wilson v. Tye, 122 Ky. 508, 92 S. W. 295, 29 Ky. Law Rep. 71. Pending the appeal this action was instituted by appellant in the court below to recover of appellee the office in question upon the ground that she is a usurper; it being averred in the petition that at the time of her election, when she gave bond, took the oath of office, and entered

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upon the performance of its duties, she was ineligible and disqualified under the law to be elected to or hold the same, first, because of her sex; second, because she was then under the age of 24 years. The appellant's alleged right to the office is based by the petition upon the ground that the election of appellee and her induction into the office being void, he had and yet has the right under the statute to remain in possession of the office and to perform its duties until a successor is duly elected. Appellee answered, traversing the affirmative matter of the petition, and alleging that the question of her eligibility to the office in controversy was raised by appellant in the action contesting the election, and that, the decision of the contest having been adverse to his contention, it constitutes a bar and estoppel to his right to rely upon the same matter in the case at bar; furthermore, that appellant after she took charge of the office of superintendent of common schools for Whitley county, by virtue of her election thereto, voluntarily surrendered to her the office and acquiesced in the action of the State superintendent of public instruction in recognizing her as the lawful incumbent thereof, which acts and conduct of appellant were also pleaded by way of estoppel. The court below upon the hearing entered judgment, dismissing appellant's petition, and of that judgment he now complains.

The pleas in bar and as to the first matter of estoppel, are not available, because this court held that the question of appellee's alleged ineligibility upon which both pleas are predicated was not up for decision in the contested election case and refused to pass on it. Section 483, Civ. Code Prac., provides: "If a person usurp an office or franchise, the person entitled

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thereto, or the commonwealth, may prevent the usurpation by an ordinary action." Section 484 provides: "It shall be the duty of the several commonwealth's attorneys to institute the action mentioned in this chapter against usurpers of county offices or franchises, if no other person be entitled thereto, or if the person entitled fail to institute the same during three months after the usurpation." Section 485 confers upon the attorney general authority to institute actions for usurpation of other than county offices or franchises, and section 486 declares who shall be deemed usurpers. Section 487 provides: "A person adjudged to have usurped an office or franchise shall be deprived thereof by the judgment of the court, and the person adjudged entitled thereto shall be placed in possession thereof, but no one shall be adjudged entitled thereto unless the action be instituted by him. * * *" It is plainly the meaning of the section, supra, that one in possession of an office, though he be a usurper, cannot be deprived of it at the suit of another claimant of the same office, unless the latter shows himself entitled thereto. On the other hand, a mere usurper may be deprived of an office in an action in the name of the commonwealth brought by the commonwealth's attorney, if it be a county office, or by the attorney general if other than a county office, though there should be no other claimant for it, and though the effect of ousting the usurper would be to create a vacancy in the office. In Tillman v. Otter, 93 Ky. 600, 14 Ky. Law Rep. 586, 20 S. W. 1036, 29 L. R. A. 110, it was held that in an action by the commonwealth for usurpation of office, the burden is on the defendant to show by what authority he holds the office ,but, where a citizen sues to recover an office, the burden is on him to show a right to it. He

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cannot recover the office on the ground that the defendant has no right to it.

So in the case at bar the first question to be considered is: Would appellant be entitled to the office in question if it should be decided that appellee is illegally holding it? If not, it will be unnecessary to pass upon the question of whether she was elligible either at the time of her election, or when she qualified and took possession of the office. It is manifest that appellee was fairly elected to the office. This was demonstrated by her majority over appellant, by the certificate issued to her by the election board, and finally by the judgment of this court. It is equally manifest that upon or immediately following the execution by her of the required bond and the taking of the oath of office as superintendent of common schools for Whitley county appellant voluntarily surrendered to her the records of the office and paid her a small sum of money in his hands as the former superintendent. We do not hold that these acts of themselves amounted to such a recognition by appellant of appellee's right to the office as to constitute an estoppel, but we do mean to say that they indicated a purpose on the part of appellant to abandon any attempt to continue the duties of the office. Moreover, the subsequent act of the State superintendent of public instruction in recognizing appellee as the rightful incumbent of the office pending the decision of the election contest removed any necessity for appellant's holding over as former or outgoing superintendent and terminated his connection with the office. While it is true section 4401, Ky. St. 1903, which provides for the election of the county superintendent of common schools, fixes his term of office, etc., declares that he shall continue in office until his successor is elected

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and qualifies, it likewise declares that, "in cases of controverted right to the office of county superintendent, the superintendent of public instruction shall have power to recognize a superintendent from among the contestants until the case has been settled." The object of this provision, as well as of the previous one empowering the county superintendent to continue in office until his successor is elected and qualifies, is to always keep an incumbent in the office to attend to the public business. Whether eligible to the office of county superintendent or not, the recognition of appellee by the State superintendent made her a de facto officer. "Where the law has provided that the office may legally be filled, then the acts of an incumbent may be valid, although not legally appointed, because the public, being bound to know the law, know that somebody may or should fill the place and perform the duties; and possession would as to them be evidence of title. But, where the law itself negatives the idea that there can be a legal incumbent, any one assuming to act assumes what every one is bound to know is not a legal office, and his acts cannot be effectual for any purpose." Mechem on Public Officers, sections 324-328. All the provisions of the statute, supra, should be considered together, and, when so considered, their meaning is clear. The courts having decided that appellant was not elected to the office of county superintendent, he has no right, therefore, to continue in office after the election and qualification of his successor. Both of these events happened in this case. When the successor qualified by virtue of her election and assumed the duties of the office, and this was followed by the State superintendent's recognition of her right to it, it was his duty to step down and out. Whether his successor became

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superintendent de jure or de facto, did not concern him. She was there, as he had been down to the time of her qualification, an incumbent of the office to perform its duties and serve the public. If his right to continue in the office did not end with the election, and qualification of appellee, it did in any event when he turned over to her the records of the office and she was recognized as county superintendent by the State superintendent. Upon being thus excluded from the office, he was excluded forever. He will not therefore be permitted to revive a right which had lapsed and ended, and as here attempted, create a vacancy in the office which he cannot fill.

The only authority cited by appellant's counsel as sustaining his contention is Howard v. Cornett, 1 S. W. 1, 8 Ky. Law Rep. 53. The report contains a mere abstract of the opinion which seems to hold that Howard, a county school commissioner, at the time of the passage of the act of May 12, 1884, creating the office of county superintendent, was entitled to remain in office in place of Cornett, although the latter had received a majority of the votes cast at the first election held for county superintendent in his county; but this was because Cornett had not been permitted to qualify, as he had failed, before offering to do so and also before his election, to procure of a circuit judge the certificate then required by law. That case is unlike the one at bar. Appellee did qualify at the time and in the matter required by the statute, and, having done so and her right to the office having also been recognized by the State superintendent, the provision of the statute that allowed appellant to continue in office until the happening of that event was fully complied with. If appellee was ineligible to the office

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of county superintendent at the time of her election, or when she qualified, or she is now wrongfully in possession of the office, the commonwealth's attorney of the judicial district in which Whitley county is situated may maintain an action to deprive her of it. As no such action has been brought and appellant in the one before us has not shown himself entitled to the office in question, we see no reason for passing upon the question of appellee's eligibility.

Wherefore the judgment is affirmed.

CASE 7.—ACTION BY ALICE CALDWELL AGAINST THE WESTERN UNION TELEGRAPH CO. FOR FAILURE TO DELIVER TELEGRAM.—June 5.

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Western Union Telegraph Co. v. Caldwell

Appeal from Fulton Circuit Court.

R. J. Bugg, Circuit Judge.

Judgment for plaintiff, defendant appeals. Affirmed.

1. Telegraphs—Operation—Actions for Damages—Questions for Jury.—In an action against a telegraph company for failure to deliver a message notifying plaintiff of her brother's death, where the evidence showed that the brother was buried the same evening before she could have reached the place, but if she had received the telegram she would have telegraphed to delay the funeral, and her wishes would have been complied with, and she could have been present at the funeral, defendant's failure to deliver the message was sufficiently the proximate cause of plaintiff's inability to attend the

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funeral, and consequent grief, to warrant the submission of that issue to the jury.

2. Same—Verdict—Excessive Damages.—In an action against a telegraph company for failure to deliver a message notifying plaintiff of her brother's death, whereby she was prevented from attending his funeral, a verdict for $1,000, though more than should have been awarded, is not so excessive and palpably unjust as to warrant a reversal.

RICHARDS & QUARLES for appellants.

GEORGE H. FEARONS, ROBBINS, THOMAS & TYLER of counsel.

POINTS AND AUTHORITIES CITED.

1. Where the plaintiff could not have attended a funeral, even if the telegram announcing the death had been promptly delivered, there can be no recovery, Howard v. W. U. Tel. Co., 27 Ky. Law Rep., 244.

2. Defendant can not be held liable on the theory that plaintiff would have telegraphed to request a postponement of the funeral; Taliaferro v. W. U. Tel. Co., 21 Ky. Law Rep., 1290; Smih v. W. U. Tel. Co., 83 Ky., 104; Chapman v. W. U. Tel. Co., 90 Ky., 265; Cumberland Telephone & Telegraph Co. v. Atherton, 28 Ky. Law Rep., 1100; W. U. Tel. Co. v. Linn, 26 S. W., 490; W. U. Tel. Co. v. Motley, 27 S. W., 52; W. U. Tel. Co v. Stone, 27 S. W., 144.

3. The verdict is excessive: No precedent for one of its size under similar circumstances.

RONEY & SMITH for appellee.

POINTS AND AUTHORITIES.

1. The undisputed evidence shows that the telegram in question was sent in ample time for the plaintiff to have attended her brother's funeral.

2. The evidence further shows that the plaintiff lived within one hundred yards of the telegraph office at Hickman, Ky., to where it was sent.

3. The telegram, though sent in ample time, was never delivered.

4. The jury saw the witnesses, heard the evidence and were properly instructed, and the verdict is not excessive.

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CITATIONS.

Western Union Tel. Co. v. Parsons, 24 Ky. Law Rep., 2008; 72 S. W., 800; same v. Lacer, 93 S. W., 34; 24 Ky. Law Rep., 379.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

This appeal is prosecuted from a judgment of the Fulton circuit court, entered upon a verdict in favor of appellee, who recovered damages for mental anguish suffered on account of being prevented from attending the funeral of her brother, due to the failure of appellant to deliver a telegram sent her announcing his death. The deceased died at Newark, Arkansas, and appellee lived in Hickman, Kentucky. The telegram in question was promptly sent by the operator at Newark, and in due course of transmission should have been delivered to appellee about 10 o'clock on the morning of August 14th, but was lost in transmission and not received by her at all, and she did not learn of her brother's death until several days afterwards. Her brother died early on the morning of the 14th, and his family, not hearing from appellee, buried him on the evening of that day. If a reply to the message had been received by them, they could and would have deferred his interment until the following day. Had appellee received the message in due time, she could have reached Newark at 8 o'clock on the morning of the 15th, and over the objection of appellant she was permitted to testify that upon receipt of the message she would at once have telegraphed the family not to bury her brother until after her arrival on the 15th, and the evidence leaves no room to doubt that her request in this respect would have been complied with. If the message had been delivered in a reasonable time after its reception,

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appellee could not have reached her brother's residence in time for the funeral if it took place on the day the message was sent. It will thus be seen that her case rests upon the proposition that, if the message had been received, she would at once have telegraphed the family to keep the remains until her arrival on the following day, and they could and would have complied with her request.

That appellant was guilty of negligence is not denied. Its duty was to have delivered the message within a reasonable time after receiving it, and this obligation it failed to discharge. Appellee's right of action to recover damages is predicated upon the theory that the failure of appellant to deliver the message announcing her brother's death was the ordinary and natural cause of her inability to attend his funeral, and her grief resulting therefrom; and the establishment of this fact lies at the very foundation of her case. As the funeral took place at a time which would have made it impossible for appellee to be present, even if the telegram had been transmitted and delivered without delay, it is argued for appellant that the failure to deliver it could not have been the proximate cause of appellee's inability to attend the funeral and view the remains of her brother, as whether she would have done this or not, if the telegram had been received in due time, depended on the contingencies that she would at once have telegraphed the family to keep the remains until her arrival and that they would have respected her wishes. It is insisted that these intervening acts that must necessarily have been performed to enable appellee to be present at the funeral removed the result so far from the cause that the injury complained of could not be considered the probable or proximate conse-

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quence of it, and that the conditions upon which appellee's deprivation of the comfort of seeing her brother were too uncertain to permit a recovery of more than nominal damages in her behalf. In support of this view our attention is called to Chapman v. Western Union Telegraph Company, 90 Ky. 265, 12 Ky. Law Rep. 265, 13 S. W. 880. There Chapman, for the failure to deliver to him a telegram announcing the serious illness of his father, and also a telegram announcing the death of his father, sought to recover damages, not only for injury to his feelings by being prevented from attending his father in his last illness and being present at his burial, but for a pecuniary loss he claimed to have sustained by not receiving a donation that his father would have made him if he could have seen him in his last illness. The court rejected his claim for damages growing out of the alleged pecuniary loss, saying that it did not naturally follow that if the telegram had been promptly delivered he would have received the donation, that his father might or might not have given it, and that such loss was not within the contemplation of the parties at the time the message was sent, nor could it have anticipated that such a loss would arise from a breach of the contract. In Smith v. Western Union Telegraph Company, 83 Ky. 104, 7 Ky. Law Rep. 22 and 255, 4 Am. St. Rep. 126, Smith, who was speculating upon the New York stock market, failed to receive a telegram relating to stock transactions in which he was interested, and, alleging that if the telegram had been delivered in due time he would have kept his margin good and saved himself from the loss of several thousand dollars, he sought to recover in damages from the company. In affirming the judgment awarding Smith nominal damages, the court rested its conclusions

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upon the ground that the damages sought to be recovered were too remote; that they did not flow naturally from the failure to deliver the telegram, and in the ordinary course of events could not have been expected to arise from its non-delivery; and the injury complained of was not contemplated by the parties at the time the contract for the transmission of the message was entered into, nor did the contents of the message inform the company of the probable action Smith would take upon its receipt.

The case at bar is easily distinguishable from the two mentioned. Here the telegram on its face furnished information of its serious import, and was notice to the company that its prompt delivery was important; and it may fairly be said to have been within the contemplation of the parties at the time the message was received that the failure to deliver it within a reasonable time would greatly grieve and distress the addressee. It is also reasonable to assume that a person to whom a message of this character is transmitted will promptly take some action in relation to it. The evidence is uncontradicted that Mrs. Caldwell would and could have promptly sent a telegram requesting that the funeral be deferred until her arrival, and that her wishes would have been respected. The contingency upon which she might have enjoyed this comfort was not remote or speculative. It is true intervening steps must have been taken, and independent causes set in motion. But there is no reasonable doubt concerning what she and the family of deceased would have done, had the message been delivered. The appellant undertook to transmit and deliver to the addressee without unreasonable delay this message, and should be held liable for the consequences of its negligence

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that in the usual course of events and according to human experience were likely to ensue, and which from the nature of the message might have been anticipated with reasonable certainty. We might not be sure what course would be pursued upon notice involving pecuniary or financial transactions, or upon notice that certain stocks and bonds were falling or rising, or upon information concerning ordinary speculative ventures. But what appellee would have done upon receipt of this message, when measured by the ordinary rules of human experience, and judged by the standards that regulate the conduct of people generally, is not of doubtful or uncertain import. Thompson on Negligence, section 2456; McPeek v. Western Union Telegraph Co., 107 Iowa, 356, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 205. In a case like this, appellant, confessedly guilty of negligence, will not be permitted to escape responsibility for its acts upon the theory that what appellee might have done was too remote to entitle her to compensation. Telegraph companies are common carriers. They owe a duty to the public and all persons using their lines, and the failure to deliver a telegram within a reasonable time after its reception is more than a mere breach of contract. It is an omission to perform a duty resting upon it as a public servant. Cashion v. Western Union Telegraph Co., 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; Reese v. Western Union Telegraph Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583. When appellant failed to deliver to appellee the telegram, she was deprived of all opportunity to act; and, as it is fair to assume that appellee could and would have taken such action as would enable her to be present at the funeral if the message had been promptly delivered, it was proper for the court to submit to the

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jury whether she was deprived of this privilege by appellant's delay in transmitting and delivering the message. Western Union Telegraph Company v. Parsons, 72 S. W. 800, 24 Ky. Law Rep. 2008.

The recovery of $1,000 in damages is more than should have been awarded; but we do not feel disposed to reverse because the amount seems to be excessive. It is extremely difficult—in fact, we might add, impossible—to fix any certain standard of recovery in cases of this character. In the very necessity of the case, the amount must be left to the judgment and discretion of the jury; and, unless their award is so excessive as to be palpably unjust, it will not be disturbed.

The judgment of the lower court is affirmed.

Petition for rehearing by appellant overruled.

CASE 8.—ACTION BY MARY FORD AGAINST THE METROPOLITAN LIFE INS. CO. ON A POLICY ON THE LIFE OF HER DECEASED HUSBAND.—June 4.

Metropolitan Life Ins. Co. v. Ford

Appeal from Jefferson Circuit Court.

C. P. BRANCH (First Div.) EMMET FIELD Judge.

Judgment for plaintiff, defendant appeals.—Affirmed.

1. Insurance—Life Policy—Misrepresentations—Evidence—Question for Jury.—In an action on a life policy, defended on the

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ground that the insured had misrepresented the extent of his use of intoxicants, evidence held to support a finding that his representations were substantially true and insufficient to defeat a recovery.

2. Same.—An insurer issuing a life policy has the right to inform itself of the habits of the insured with respect to the use of intoxicants and he must truthfully give the information asked; but, unless his representations are substantially untrue, they are not misrepresentations precluding recovery on the policy.

3. Same—Application for Other Insurance—Rejection—Misrepresentations—Evidence.—An insurer defending an action on a life policy on the ground that the insured falsely stated that an application to another insurer for insurance had not been rejected has the burden of proving that the rejection was made known to the insured before he applied for the policy sued on; there being no rejection until knowledge of it was received by the insured.

4. Same—Presumption.—In the absence of proof that an insured knew of the rejection of his application for other insurance at the time he applied to an insurer, it will be presumed in an action on a policy issued by the latter that his answer in the application, that applications for other insurance had not been rejected, was true.

5. Same—Misrepresentations—Evidence.—An applicant for a life policy stated in his application that applications for other insurance had not been rejected. The application was dated July 18th. He had applied for other insurance and the medical examiner on July 3d made a report thereon, rejecting the risk. It was not shown when the rejection was ordered made by the insurer, or that the applicant was notified thereof. Held to authorize a finding that the applicant did not have knowledge of the rejection of his application for other insurance, and that his statements were not misrepresentations sufficient to defeat a recovery on the policy.

6. Same—Evidence—Instructions.—Where, in an action on a life policy, defended on the ground that insured had in his application falsely stated that applications for other insurance had not been rejected, the evidence showed that an application for other insurance had been rejected fifteen days before the date of the application, but did not show that he had been notified of the rejection prior to the making of the application, an instruction that the representations in the application as to there having been no refusal of insurance did not prevent a recovery, unless insured had knowledge of such refusal when

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the application for the policy sued on was signed, properly submitted the issue.

7. New Trial—Grounds—Cumulative Evidence.—A new trial after verdict on the ground of newly discovered evidence was properly denied; the evidence being as to a point litigated and cumulative.

EUGENE R. ATKISSON AND F. M. SACKETT for appellant.

POINTS AND AUTHORITIES DISCUSSED.

1. A peremptory instruction should have been given for defendant: Sec. 639, Ky. Stats.; Providence Savings Life Assurance Society v. Dees, 27 Ky. Law Rep., 670; Providence Savings Life Assurance Society v. Whayne's admr., 93 S. W., p. 1052; Union Central Life Ins. Co. v. Lee, 20 Ky. Law Rep., 839; Mutual Life Ins. Co. v. Thompson, 94 Ky., 253; American Aid Society v. Bronger, 12 Ky. Law Rep., 284; Metropolitan Life Ins. Co. v. Schmidt, 93 S. W., 1056; Anderson v. Fitzgerald, 4 H. L. Cas., 484; American Aid Society v. Bronger, 12 Ky. Law Rep., 284; Meyer Bruns v. Penn Mutual Life, 189 Pa., 579; March v. Metropolitan Ins. Co., 186 Pa., 629; American Union Life v. Judge, 181 Pa., 484; Finch v. Modern Woodmen, 113 Mich., 646; Ferris v. Home Life, 118 Mich., 485; Mutual Life v. Nichols, 24 S. W., 910; Clapp v. Mass. Ben. Assn., 146 Mass., 519; Kelly v. Life Ins. Co., 113 Ala., 453; Hambrough v. Mutual Life, 72 L. T. N. S., 140; Bennett v. Anderson, 1 Ir. Jur., 245; Union Nat. Bank v. Manhattan Life Ins. Co., 52 La. Ann., 36; Landon Assurance Co. v. Masel, L. R. 11 Ch. Div., 363; Fowkes v. Manchester Ins. Co., 3 Fost. & F., 440; Germania Life Ins. Co. v. Nukenheimer, 127 Ind., 536; Security Mutual Life Ins. Co. v. Webb., 106 F. R., 808; Kemp v. Good Templars, 19 N. Y. Sup., 435; Edington v. Aetna Life Ins. Co., 77 N. Y., 5640; S. C. 100 N. Y., 536; Clemens v. Supreme Assembly, 131 N. Y., 485; Bernard v. United Life Assn., 32 N. Y. Sup., 224; Aloe v. Mutual Reserve Fund, 49 S. W., 553; Bruce v. Conn. Mutual Life, 77 N. W., 210; Mutual Life v. Nichols, 24 S. W., 910; Home Life Ins. Co. v. Myers, 112 F. R., 846; Jeffries v. Life Ins. Co., 22 Wall., 47; Stuart v. Mutual Reserve, 78 Hun., 191; Finn v. Metropolitan Life, Atl., 438.

2. The court erred in instructing the jury that applicant's misrepresentation as to prior rejection by another company would avoid the policy sued on only in the event that he had been informed of that fact by the company to which he had made application, or had knowledge of the fact that his application for other

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insurance had been refused: Germania Ins. Co. v. Rudwig, 80 Ky., 223; Carrollton Furniture Mfg. Co. v. American Credit Co., 115 F. R., 77; 16 Amer. Encycl. Law (2d Ed.), 933; Kerr on Ins., p. 343; 1st May on Ins., sec. 181; American Mutual Aid Society v. Bronger, 12 Ky. Law Rep., 284; Providence Savings Life Assurance Society v. Dees, 27 Ky. Law Rep., 670; American Union Life Ins. Co. v. Judge, 191 Pa., 484; 43d Atl., 374.

3. The court should have granted defendant a new trial on the ground of newly discovered evidence: Ousley, Sr., v. Ousley, Jr., 25 Ky. Law Rep., 1186.

CARUTH, CHATTERSON & BLITZ for appellee.

AUTHORITIES CITED.

1. Whether or not the answers made by the insured to the questions in the application were "substantially true" was properly left to the jury: Providence Savings Life v. Whayne, 29 Ky. Law Rep., 167; Mutual Life Ins. Co. v. Thomson, 94 Ky., 259; Providence Savings Life Co. v. Dees, 27 Ky. Law Rep., 671; Metropolitan Life Ins. Co. v. Schmidt, 29 Ky. Law Rep., 256.

2. The court correctly instructed the jury on the question of misrepresentations, and properly directed it to find for the plaintiff if the answers made were substantially true or to find for the defendant if any of them (stating the questions and answers) were substantially untrue: Providence Savings Life v. Dees, 27 Ky. Law Rep., 671; Providence Savings Life v. Whayne, 29 Ky. Law Rep., 167; Illinois Life Ins. Co. v. DeLang, decided February 8, 1907.

3. The instruction to find for defendant if the jury believed from the evidence that Ford had applied to another insurance company and had not received the exact amount of insurance that he applied for; and that he had been informed of that fact by the company to which he had made application; or he had knowledge of the fact that his application of insurance had been refused, expresses correctly the law on that question. The burden of proof was on the defendant, and there is no proof that he had been informed or knew of his rejection. He could not make a misrepresentation of something as to which he had no knowledge: Vol. 2 Joyce on Insurance, sec. 1846 and sec. 1823; Metropolitan Life Ins. Co. v. Schmidt, 29 Ky. Law Rep., 256; American Mutual Aid Society v. Bronger, 12 Ky. Law Rep., 285; German American Ins. Co. v. Norris, 100 Ky., 229.

4. The motion for a new trial because of "newly discovered evidence" was properly overruled. There was a complete absence

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of diligence; and the "newly discovered evidence" was not of such a character as to warrant a court in setting aside the verdict of a jury: City of Covington v. Bostwick, 26 Ky. Law Rep., 782; Illinois Central R. R. Co. v. Colly, 27 Ky. Law Rep., 714.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This is an appeal from a judgment of $1,000 recovered against appellant by appellee in the court below upon a policy of insurance on the life of her husband, John Ford, whose death occurred in Jefferson county. The application for the policy bears date July 18, 1905. The policy was issued and delivered to the insured during the same month and his death, caused by acute Bright's disease, occurred October 16, 1905. Three matters of defense were presented in the court below by appellant's answer: (1) That, in order to pass the required physical examination at the hands of appellant's physician, the insured caused himself to be personated by another who falsely assumed his name and thereby deceived the physician; (2) that the insured misrepresented the extent to which he used intoxicating liquors; (3) that he falsely represented that he had not applied for other insurance and been rejected.

As to the first contention of appellant, there was a failure of proof. The issue was, however, submitted to the jury by the instructions, and no complaint is made by appellant that the verdict of the jury could have been otherwise than adverse to it in respect to that defense.

As to the second contention, the evidence was conflicting. That of appellant conduced to prove that Ford drank intoxicating liquors to excess, even to intoxication at times, but not that he was an habitual drunkard. On the other hand, appellee's testimony

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tended to prove that he was a moderate drinker of intoxicants. This testimony came, in the main, from fellow workmen and intimate friends of the insured, whose opportunities for learning his habits were afforded by daily association with him covering a period of from two to ten years. Some of them admitted they had seen him on two occasions when he appeared to be drinking, but did not testify that such was his habit. The insured, in reply to a question, stated in the application that he drank "two whiskies a week." The application did not specify the quantity or quality of intoxicants he was privileged to drink, or prohibit his taking that number each week. The testimony fails to show that he took more than two drinks any week. Obviously this question should have gone to the jury, and it was allowed by the court to do so. There was some evidence, and a very considerable amount of it, to support the finding of the jury, and we cannot say the verdict was flagrantly against the evidence as to that question. While appellant insurance company had the right to inform itself of the habits of the insured, and it was his duty to truthfully give it the information asked, unless the representation made by him as to his use of intoxicating liquors was substantially untrue, it cannot be called such a misrepresentation as would prevent a recovery. In Mutual Life Insurance Company v. Thompson, 94 Ky. 259, 14 Ky. Law Rep. 800, 22 S. W. 89, the court, in discussing this question, said: "But it seems to us an inquiry in regard to the previous habits of drinking intoxcating liquors is not material, unless they exist to such an extent as to affect the health or physical condition of the applicant, and thereby render him an unsatisfactory subject for life insurance." In Provi-

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dent Savings Life Assurance Society v. Dees, 120 Ky. 285, 86 S. W. 522, 27 Ky. Law Rep. 670, the question of misrepresentation as to the use of intoxicants by the insured was involved, and the court held that it was a question for the jury, to be submitted under proper instructions. Provident Savings Life Assurance Society, etc. v. Whayne, 93 S. W. 1049, 29 Ky. Law Rep. 160; Metropolitan Life Ins. Co. v. Schmidt, 93 S. W. 1055, 29 Ky. Law Rep. 256.

Appellant's third contention rests upon the following questions and the answers thereto, all found in the application signed by the insured: "Have you ever applied to any life insurance company, order, or association for insurance on your life without receiving the exact kind and the amount of insurance applied for? (If 'yes,' give particulars.") To this Ford answered: "No." "State name of the life insurance company, order, or association which has declined to issue a policy on your life, or, after issuing, has recalled it, or has postponed you, except as stated in the foregoing answer." To which Ford answered: "None." The evidence appearing in the record shows that the insured applied on June 23, 1905, 25 days before applying to appellant, for a policy of insurance in the Commonwealth Life Insurance Company, and that he was examined by the medical examiner of that company June 29th, which was seventeen days before the application was made to appellant; that the medical examiner reported to the Commonwealth Life Insurance Company on July 3d rejecting the risk. It further appears from the evidence that it is the custom of the Commonwealth Life Insurance Company to pass on the report of examination in a day or two after they are received at the chief office, or during the same week. The evidence does

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not, however, show when the rejection of Ford's application was ordered or made by that company, or that he was ever notified of its rejection. The report of the medical examiner is not always accepted. If adverse to the applicant, the company may nevertheless offer some other form of policy to the applicant than the one applied for, or it may order another examination. It only appears in the case at bar that the application of Ford for insurance in the Commonwealth Life Insurance Company was rejected by that company between June 29 and July 18, 1905. The burden was upon appellant to show that the rejection had been made known to Ford before he applied to appellant for insurance. It failed to prove that this was done, and appellee testified that she was constantly with her husband and knew all about his business, and that he was never informed of the rejection of his application by the Commonwealth Life Insurance Company. The fact that he sought and obtained insurance of appellant is not even persuasive of his having been notified of his rejection by the other company, in view of his having about that time declared his intention to obtain $1,500 or $2,000 of insurance on his life. It is not apparent, therefore, that Ford did not state the truth as he knew it in representing to appellant that he had not been refused insurance at the hands of another company previous to his applying to appellant for insurance. His rejection by the Commonwealth Life Insurance Company was not complete or effective until notice or information of it was received by him. Such notice in some form or by some means was necessary to constitute the rejection, and, until it was received by him, he had no right to believe that the insurance for which he had applied would not be granted to him.

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In the absence of proof that Ford knew of his rejection by the other company when he applied to appellant for insurance, it will be presumed that the answers made by him in the written application to appellant, as to other insurance, were true. It must be conceded that, if Ford made the misrepresentation attributed to him, it was as to a matter material to the risk which appellant had the right to know, but, if he did not know that another company had declined to issue to him a policy, how can it be said that the answers made by him on that subject in the application to appellant were untrue, or that they were misrepresentations? It was the duty of the jury to determine from the evidence whether the insured at the time of making the answers contained in the application knew of the previous refusal of another company to insure him, and the burden was on appellant to show such knowledge on his part. If there had been such a refusal, and the insured knew of it, his answers were untrue, and they constituted misrepresentations. The meaning of the verdict is that he did not have such knowledge, and that his statements were not misrepresentations, and, as there was evidence to support the verdict, it must stand. 2 Joyce on Insurance, section 1846, thus states the principle controlling the question under consideration: "There are two important factors involved in cases of concealment. One is the assured's knowledge, and the other the insurer's knowledge. In both cases the knowledge may be actual, or rest upon a presumption based upon the fact that the circumstances are of such a character that they ought to be known, and may reasonably be presumed to be known. The assured could not reasonably be held to have concealed a fact of which he had no knowledge, actual

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or presumed, or one concerning which it cannot be said that he ought to have known it. Even the strict rule in marine insurance does not require this."

The instructions given by the trial court are as follows: "Gentlemenof the jury: You should find for the plaintiff in the sum of $1,000, with interest from November 1, 1905, unless you shall believe from the evidence that some other man than John Ford named in the policy of insurance issued by the defendant was examined by the medical director of the defendant for the John Ford named in the petition. If some other man was substituted for John Ford, and procured to be examined by the medical director in the place of the John Ford named in the petition and in the policy of insurance, then the law is for the defendant, and you should so find. When John Ford made application to the company for insurance, there were certain questions submitted to him by the company to be answered by him if the John Ford named in the policy was the man who answered the questions submitted. The questions and answers were as follows: '(1) To what daily or other extent do you use alcoholic stimulants?' To which he answered: 'Two whiskies a week.' '(2) To what daily or other extent do you use wine or malt liquors?' To which he answered: 'No.' '(3) Have you ever applied to any life insurance company, order, or association for any insurance on your life without receiving exact kind and amount of insurance applied for? (If "yes," give particulars.)' To which he answered: 'No.' '(4) State name of life insurance company, order, or association which has declined to issue a policy on your life, or after issuing has recalled it, or has postponed you, except as stated in the foregoing answer.' To which he answered: 'No.' (5) Have you ever under-

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gone examination for life insurance upon which you did not receive the exact amount and kind of policy applied for? (If "yes," give particulars.)' To which he answered: 'No.' Now, if you shall believe from the evidence that the answers given by John Ford to these questions or to either of them were not substantially true, and you shall further believe from the evidence that he drank materially more whisky or other intoxicants named in these questions than he stated in the answers he did drink, then the law is for the defendant, and you should so find. Or, if you shall believe from the evidence that he had applied to another insurance company, and had not received the exact amount of insurance that he had applied for, and that he had been informed of that fact by the company to which he had made application, or he had knowledge of the fact that his application for other insurance had been refused, then the law is for the defendant, and you should so find. But unless you shall believe from the evidence that the answers given by John Ford to the questions named, or either of them, were substantially untrue, or that some other person was substituted for John Ford in the medical examination, then the law is for the plaintiff, and you should so find for the plaaintiff to the extent that I have indicated to you in the beginning of these instructions."

It is insisted for appellant that, though in the main correct, the instructions contain one error. The alleged error is in advising the jury in substance that the representations in the application as to there having been no refusal of insurance to Ford by another company would not prevent a recovery, unless he had knowledge of such refusal, when the application in question was signed by him. The lower

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court doubtless acted upon the theory that under the facts of this case there could have been no rejection by another insurance company of the application from Ford for insurance without his knowledge, because notice to him of the refusal was necessary to constitute the rejection. We think this is true, and for this reason the case at bar is unlike the several cases, some of them recently decided by this court, relied on by counsel. We think the instructions apply to the facts of this case, and that they contain all the law that was necessary to guide the jury in arriving at a verdict.

It is further insisted for appellant that it should have been granted a new trial on account of the alleged newly discovered evidence set forth in the affidavit filed in the court below. The newly discovered evidence is as to an application for insurance claimed to have been made by Ford to the Interstate Life Insurance Company before his application was made to appellant for insurance, and that the application was rejected. The affidavit of appellant's agent does not show proper diligence. On the contrary, it is reasonably apparent that the evidence in question might by proper diligence have been discovered in time for the trial of this case. Besides, it is as to a point litigated on the trial, and is purely cumulative. "It is a general rule that a new trial should not be granted upon the sole ground of a discovery after verdict of parol testimony concerning a point litigated, or a fact known to a party at the trial, because the converse of this rule would open a wide field for unfairness and subornation, and would tend to protract litigation, and render it not only uncertain, but almost interminable." City of Covington v. Bostwick, 82 S. W. 569, 26 Ky. Law Rep. 782; I. C. R. R.

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Co. v. Colly, 86 S. W. 538, 27 Ky. Law Rep. 714; Finley v. Curd, 62 S. W. 50, 22 Ky. Law Rep. 1914; Richardson v. Huff, 43 S. W. 454, 19 Ky. Law Rep. 1429; Price v. Thompson, 84 Ky. 220, 8 Ky. Law Rep. 201, 1 S. W. 408.

We are therefore of opinion that the court did not err in refusing the new trial on the ground of newly discovered evidence.

Finding no cause to disturb the judgment appealed from, the same is affirmed.

CASE 9.—ACTION BY JOSEPH BOSWORTH AGAINST NAPIER ADAMS AND OTHERS INVOLVING THE VALIDITY OF AN ACT OF THE KENTUCKY LEGISLATURE APPORTIONING SENATORIAL DISTRICTS OF THE STATE.—June 7.

Adams, Etc., v. Bosworth

Appeal from Whitley Circuit Court.

M. J. Moss, Circuit Judge.

Judgment for plaintiff, defendants appeal. Reversed.

States—Legislature — Apportioning Membership — Constitutional Law.—The apportionment of the State into Senatorial districts under Act June 28, 1893 (Laws 1893, p. 1204, c. 235), having been accepted for thirteen years without its validity being questioned, the constitutionality of the act may not be questioned on the ground that the act infringes Const. Sec. 6, providing that "all elections shall be free and equal," and Section 31, requiring an apportionment as nearly equal as may be of Senatorial districts.

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C. W. LESTER for appellants.

This appeal involves the constitutionality of the act of the Kentucky Legislature approved June 28th, 1903, entitled "An Act dividing the State into thirty-eight Senatorial Districts;" also the validity of the Act of May 9th, 1890, adding Owsley county to what is the Seventeenth Senatorial District under an Act of said Legislature of February 19th, 1874.

A proposed primary election to be held on April 2, 1907, under the said Act of June 28, 1903, and the taking of steps preparatory thereto, is enjoined.

The judgment below, rendered after overruling the appellant's demurrer, held said two acts invalid and granted the injunction.

The grounds for a reversal briefly stated are:

1. The court had no power to enjoin an election on the steps being taken to hold it.

2. The enactment of the acts in question was a matter within the discretion of the Legislature. It is a political and not a judicial matter: Wise Case 79, Va., 269.

A reversal is respectfully asked.

WM. H. HOLT for appellees.

GEORGE DURELLE, E. L. WORTHINGTON, W. C. HALBERT of counsel.

POINTS AND AUTHORITIES.

1. Whether a legislative apportionment act is constitutional is a judicial, and not a political, question.

2. A voter and candidate, or a voter only, may sue to test its validity.

3. A legislative apportionment act so grossly unequal as to population and territory as to show it was passed ignoring equality of representation is unconstitutional and therefore void: Purnell v. Mann, 105 Ky., 91; Massengale, Clerk, v. Lester, 101 Ky., 191; McPherson v. Blacker, 146 U. S., 2-24; Giddings v. Blacker, 93 Mich., 1; Houghton Co. Supervisors v. Blacker, 16 L. R. A., 432; Williams v. Prescott, Mich, July 24, 1906; Parker v. State, 133 Ind., 178; Brooks, Clerk, v. State, 162 Ind., 568; State v. Cunningham, 81 Wisc., 446; State v. Cunningham, 83 Wisc., 90; People v. Thompson, 155 Ill., 451; Denny, Clerk, v. State, 144 Ind., 503; State v. Wrightson, 56 N. J. Law, 126; Young v. Beckham, 24 Ky.

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Law Rep., 2135; Neal-Young case, 24 Ky. Law Rep., 183; Brown case, 23 Ky. Law Rep., 2422; 18 L. R. A., 567, 578.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

In this action, the validity of an act of the Legislature approved June 28, 1893 (Laws 1893, p. 1204, c. 235), apportioning the State into senatorial districts, is assailed upon the ground that it is in violation of section 6 of the Constitution, providing that "all electons shall be free and equal," and section 33, providing, in part, that "the first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight senatorial districts and one hundred representative districts, as nearly equal in population as may be without dividing any county, except where the county may include more than one district, which district shall constitute a senatorial and representative district for ten years." The petition sets up in detail alleged gross inequality in the population of a number of the districts. The cause being submitted on the petition and exhibits, the lower court adjudged that the act of 1893, and also an act of the Legislature approved May 9, 1890, adding the county of Owsley to the seventeenth senatorial district, were each of them in violation of the Constitution of the United States and of the State of Kentucky, and both of said acts were declared null and void.

We do not deem it necessary to write an elaborate opinion in this case, but will virtually content ourselves with restating and adopting a portion of the opinion of this court in Ragland v. Anderson, 100 S. W. 865, 125 Ky. 141, 30 Ky. Law Rep. 1199, handed

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down on March 20, 1907, in which opinion the court, after holding the act of March, 1906, redistricting the State into representative districts, void, said: "It is no answer to the demand of appellees that the act of 1906 be declared unconstitutional that it will follow that the act of 1893 must also be declared unconstitutional, because it created unequal representative districts, although in a less degree than that of 1906. The conclusion sought to be drawn does not follow. The act of 1893 has gone into effect and the government has been organized under it. To hold it void would be to throw the government into chaos; and this no court is required to do. It is now too late to question its validity. The next Legislature must be elected under it, and then we have no doubt the members, impelled by their sense of duty and the obligations of their oath of office, together with that spirit of justice which is the heritage of the race, will redistrict the State as the Constitution requires." The senatorial districts have remained unchanged since the apportionment of 1893, when the State was redistricted in accordance with the mandate of the Constitution adopted in 1891. During the thirteen years that elapsed between that time and the institution of this action, the apportionment then made has been accepted without question by the people of the entire State; and, if there was no other reason for now refusing to disturb it, this long acquiescence would be sufficient.

This action, although in the name of a few individuals, is in fact and truth instituted and prosecuted for the use and benefit of one of the political parties of the State, the adherents of which conceive themselves aggrieved by the alleged denial of fair and equal representation in the legislative department of the

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State in the apportionment attacked. If the enactment complained of was invalid because it violated the constitutional requirements, the party complaining knew this fact thirteen years before this suit was commenced. Persons who believe that their political rights are injuriously affected by unconstitutional legislation cannot condone the wrong for a long period of years by passively consenting to it, and defer taking action until confusion, if not chaos, would result from the long delay. The courts were open to them in 1893 as well as 1906, and political parties, no more than individuals can sleep on their rights. When it is sought to vacate enactments involving the life of one of the great co-ordinate departments of the government, the public interest and the orderly administration of affairs demand that action should be taken as soon as practicable after the condition objected to becomes known and effective. The argument that, if an act is invalid when passed, the vice continues to live in it as long as it remains on the statutes, and therefore it may be annulled at any time, is not sound when attempted to be applied to legislation that is political or administrative in its nature. It may be true that laches cannot give validity to a void act; but when no property right is involved, and the question is purely political and administrative, individuals or parties that have seen the act in operation for years, and the affairs of State carried on under it, without offering objection or making protest, will not be heard at a late day to question its validity. They must act in seasonable time, and not delay until the conditions they have acquiesced in and assented to have become firmly established as a part of the system of government.

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The judgment of the lower court is reversed, with directions to dismiss the petition.

CASE 10.—PROCEEDINGS BY THE COMMONWEALTH THROUGH THE AUDITOR'S AGENT AGAINST MAX SOLLIGER TO RECOVER TAXES UPON WHISKY STORED IN WAREHOUSE IN GERMANY. —February 16.

Commonwealth v. Solliger

Appeal from Jefferson Circuit Court.

(First Chancery Branch) SHACKELFORD MILLER, Judge.

Judgment for defendant, plaintiff appeals. Reversed.

1. Commerce—Duties of Exports—Taxation of Merchandise.—A tax levied upon exported property which operates indirectly as the laying of a duty upon the export is as much within the inhibition of Const. U. S. Art. 1, Sec. 10, providing that no State shall, without the consent of Congress, lay any imposts or duties on exports or imports, as the laying of a duty directly.
2. Same.—Const. U. S. Art. 1, Sec. 10, provides that no State shall, without consent of Congress, lay any imposts or duties on imports or exports. Ky. Stats., 1903, Sec. 4020, provides that all real and personal estate within this State, and all personal estate of persons residing in this State, shall be taxed. A general tax was laid by the State upon all property alike, and it was sought to tax whisky exported to a foreign country, on the ground that the exportation was colorable only, and to escape taxation, as it was intended to reimport it; or, if the situs of the whisky was in the foreign country,

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then to tax the warehouse receipts representing it which were owned in this State. Held, that the proposed tax was not an attempt to lay a duty on the whisky, because it was exported, within the meaning of the Const. U. S. Art. 1, Sec. 10.

3. Taxation—Liability of Persons and Property—Situs of Property.—Although Ky. Stats., 1903, Sec. 4020, provides that all real and personal estate within this State and all personal estate of persons residing in this State shall be subject to taxation, it does not include personal estate owned by persons residing in this State, but which is tangible and permanently located in other States, and employed there in the prosecution of their owner's business.

4. Same—Motive of Exporter.—The motive of an exporter of property to a foreign country cannot be safely inquired into for the purpose of determining whether the exportation was in good faith, or made simply to escape the payment of taxes, and this State neither has nor should attempt to exercise further jurisdiction for any purpose over exported property.

5. Same—Nature of Property—Warehouse Receipt.—Warehouse receipts, wherever issued, and whatever they may represent, are intangible personal property, whose situs for purposes of taxation is the domicile of their owner; hence a warehouse receipt owned by a person domiciled in this State for whisky exported to a foreign country may and should be taxed here, and at such value as it may have had on the day fixed by the statute for listing property.

M. J. HOLT for appellant.

BEN F. WASHER of counsel.

CONCLUSIONS OF LAW AND AUTHORITIES CITED.

1. Unless exempted by Art. 1, Sec. 10, Subsec. 2, of the Federal Constitution appellee's whisky should be assessed as omitted property for taxation, because he is a resident of Kentucky, "and all personal estate of persons residing in this State, whether the property be in or out of this State," shall be assessed at its fair cash value: State Const., Sec. 172; Ky. Stats., 4020-4022-4052; Commonwealth v. Union Ref. Tr. Co., 26 Ky. Law Rep., 23; Johnson, Sheriff, v. Bradley, etc., 27 Ky. Law Rep., 541.

2. If this 8,000 barrels of whisky was exported temporarily; or not for use; that is, to await a better market, or to evade for the time being, the revenue tax of 90c per gallon, the situs of same

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for the purpose of taxation is in Kentucky the place of residence of the owner. In order to come within the exception of exemption of the Union Refrigerator Transit Company case, it must be permanently located in another State and in use in that State: Board v. Fidelity Trust, etc., 111 Ky. 667; Union Refrigerator Tr. Co. case, 199 U. S., 194.

8. If the whisky by reason of the provision of the Federal Constitution is exempt as an export from a State ad valorem tax, then the warehouse receipts as the intangible property of appellee are subject to assessment as omitted property. Warehouse receipts, by common and civil law and by express statutory provisions (Ky. Stats., Sec. 4770) are negotiable and transferable; Const. sec. 172., Ky. Stats., sec. 4020; First National Bank v. Boyce, 78 Ky., 42; Newcomb, Buchanan & Co. v. Cabbell, 10 Bush., 468, 469; Farney v. Ethridge, 24 Ky. Law Rep., 653; Greenbaum Bros. v. Meggiber, 10 Bush., 420; Cochran, etc., v. Ripey, 13 Bush., 505; Commonwealth v. Union Ref. Tr. Co., 26 Ky. Law Rep.; Board of Council, etc., v. Fidelity Trust Co., 111 Ky., 667.

4. The provisions of the Federal Constitution, Art. 1, Sec. 10, Subsec. 2, "that no State shall lay any impost or duties on imports or exports" does not apply to the levy of an ad valorem tax on this whisky as the property of appellee, because:

a. This is not an impost or duty.

b. This whisky has lost the character of an export. It is at its destination. The original shipment is broken. Two-thirds of it has been sold. The consignor and the consignee are one and the same, and the residue is on the market and for sale: May v. New Orleans (import case), 178 U. S., 501 to 509; Turpin v. Burgess (export case), 117 U. S., 506 to 507; American Steel Co. v. Speed, 114 U. S., 519 to 520.

5. This is not a tax imposed by Kentucky upon the whisky as a foreign product, nor a tax by reason of the whisky being exported, nor a tax while it is in a state of transit to some other place of destination. It is sought to be imposed upon the whisky after its exportation, after its arrival at its destination and it has become a commodity in the market at its place of destination. It therefore enjoys no discriminating favors, other than all tangible property of residents of this State situated beyond the limits of this State: 114 U. S., 623-633; 178 U. S., 508, 509; 117 U. S., 506, 507.

The exporter of goods does not escape taxation on such goods where he retains the ownership after they have reached their destination and he places same upon the market for sale: Turpin v. Burgess, 117 U. S., 504.

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DODD & DODD for appellee.

The conceded facts in this case raise the following two legal questions, to-wit:

1. Whether or not whisky exported in bond from Kentucky to foreign countries under the Federal regulations renouncing the governmental tax thereon ceases from the dates of such exportation to be further liable for any subordinate geographical taxation thereon so long as the same remains as such export. That is to say, whether or not the situs of the said whisky as tangible personal property is liable for taxation at the domicil of the owner thereof regardless of its actual foreign situs?

2. Whether or not the Federal constitutional provisions contained in Sec. 10, Art. 1, of the Federal Constitution, reading as follows:

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws," is not a positive prohibition against the taxation of any such exported articles so long as their situs remains foreign to the territorial boundary of the United States.

AUTHORITIES CITED.

Union Refrigerator Transit Co. v. Commonwealth of Kentucky, 199 U. S., 194; 26 Ky. Law Rep., 23; Delaware, etc., R. R. Co. v. Pennsylvania, 198 U. S., 341; City of Louisville v. Louisville Pub. Warehouse Co., 107 Ky., 185; Commonwealth v. Ayer & Tie Co., 25 Ky. Law Rep., 1068; Low v. Austin, 13 Wall., 32; American Steel Co. v. Speed, 192 U. S., 519; Brown v. Houston, 114 U. S., 628; May v. New Orleans, 178 U. S., 496; Austin v. Tennessee, 179 U. S., 343; Amy v. California, 24 How. 169; Clark v. Clark 2 Woods, 411; Fairbanks v. U. S., 181 U. S., 283; Pittsburg Coal Co v. Bates, 156 U. S., 587; Norfolk, etc., R. R. Co. v. Sims, 191 U. S 449; Pitkin v. Brooks, 193 Ill., 269.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR.—Reversing.

Appellee, Max Solliger, was the owner of a large quantity of whisky in bond for more than five years before the institution of this proceeding in the Jeffer-

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son county court to require him to list the whisky, or the warehouse receipts evidencing it, for taxation, as omitted property. Solliger had owned the whisky for a number of years. It had not been removed from the distillery bonded warehouse in Kentucky, where it was stored under the provisions of the revenue laws and regulations of the United States, until the internal revenue tax on it had been paid. Just before the expiration of the period when, under the statutes of the United States, it was required that the internal revenue tax upon it be paid, and the whisky removed, appellee, Solliger, owner of say 8,000 barrels of the whisky, removed it for export. Under the provisions of the United States statutes, that was allowed; the federal government in that event renouncing its taxes against it. All State taxes were paid on it up to that time. The whisky was exported to Hamburg and Bremen in Germany, where it was stored in public warehouses, in the name and for the benefit of the consignor. The warehousemen issued warehouse receipts therefor to the consignor, who was also the consignee. Appellee, Solliger, had the possession and the title to these receipts until they were sold, which was within the period for which they are sought to be taxed, some of the whisky represented by them having been reshipped—probably a third or more of it to the United States, and some to Kentucky.

The contentions of the auditor's agent in this proceeding to tax the property are: (1) That the exportation of the whisky was done in order to escape the payment of taxes upon it, and, as it was then intended to reimport it to the United States and to Kentucky, the character of the title and possession of the owner was never changed, and it was conse-

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quently subject to taxation in Louisville, Kentucky, the domicile of its owner. (2) That if the situs of the whisky be deemed to have been fixed in Germany by reason of the exportation, the warehouse receipts were nevertheless property, which, being in Kentucky where the owner resided, were taxable here. Appellee's contention is that neither the whisky nor the warehouse receipts were taxable in Kentucky, because under section 10, article 1, Const. U. S., providing, "No State shall, without consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws," it was not within the power of the State to levy a tax upon property which had been or was being exported. Whether the inhibition of the federal Constitution be against the levying of a tax, by way of impost or duty, upon the act alone of exporting property, we do not deem it necessary to decide in this case. It may be safely conceded that to levy a tax upon exported property, which should operate indirectly as the laying of a duty upon the export, is as pernicious as to lay it directly. We do not find the slightest evidence of a purpose on the part of the State to lay a duty on the whisky because it was exported, by imposing the tax in question. On the contrary, the tax is levied upon all personal property owned by citizens of this State, where situated (if subject at all to the taxing jurisdiction of the State), upon the sole theory that its situs for purposes of taxation is the domicile of the owner, and, as the owner resides here, and has the benefit of the protection of the laws and government of this State over his person, he should, in proportion to the wealth which attends his person, bear his share of the expense of the State government.

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Although the taxing statutes of this State provide (section 4020, Ky. St. 1903): "All real and personal estate within this State, and all personal estate of persons residing in this State, * * * shall be subject to taxation unless the same be exempt from taxation by the Constitution"—it must be construed not to mean personal estate owned by persons residing in this State, but which is tangible and permanently located in other States, and employed there in the prosecution of the owner's business. Such property, not enjoying any benefit or protection from the laws of this State, but deriving such benefit wholly from the laws of the State where situated, for which it is presumably taxed there, is not deemed within the taxing jurisdiction of this State. Union Refrigerator Tr. Co. v. Kentucky (U. S.) 26 Sup. Ct. 36, 50 L. Ed. 150. We do not apprehend that the motive of the exporter could ever safely be inquired into. For, if a State could say to such, "We find the fact to be that you are not exporting in good faith for sale, or permanent location of your property abroad, therefore we will tax it, notwithstanding it is export merchandise," in that way the State could vexatiously interfere with a subject over which Congress has been ceded the entire control. It is safer to treat the property exported as being thereafter within the jurisdiction of the government within whose territory it may be lodged. The whisky in the case at bar having been stored in a warehouse in Germany, where it became a part of the mass of property within the German Empire, doubtless owed a duty to pay taxes to the support of that government while there. The State of Kentucky neither had nor should attempt to exercise further jurisdiction over it for any purpose.

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The warehousemen in Germany who issued warehouse receipts for the whisky created a distinct property in the receipts. While in a sense they represented the whisky, being its symbol for certain purposes, it could scarcely be maintained, for it is not true, that they stand in lieu of the whisky for all commercial purposes. Like all symbols, they are fictions; so are promissory notes, and bonds. Each is a representative or evidence of something else. Everywhere each has an individual value, derivative, it is true, from the thing upon which it is rested, yet is deemed distinct property. A bond is an evidence of the promise of its maker to pay its face at a time ascertainable. Its original commercial value depends upon the value of the security supporting it, whether it be the solvency of its maker, his credit, or the hypothecation of collateral to insure its being redeemed. Its indorser may add to its original value as property by his solvency, and so forth. Yet, as so much paper, it is valueless whether for taxation or trade. It may rest for the security of its redemption upon real estate, or for that matter whisky, mortgaged, while it derives its value as a commercial asset in part, or maybe in whole from the mortgaged property, securing it, it is always and everywhere deemed property of the value which it may have in the market, and may be taxed although the property mortgaged to redeem it is beyond the taxing district, and may also be taxed where it is situated.

A warehouse receipt partakes of some of the same features. Its original value may depend entirely on the value of the chattel it represents, and which is deemed to be in pledge to redeem it. But such receipts are generally negotiable, as bonds and bills of exchange are. Each indorser may add materially to

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their value. They float upon the markets of the world as property, as surely as bonds are property. Whoever owns them, owns that much of assets having such value as the market affords to them, which may be sold, hypothecated, attached for debt, and are the subject of inheritance. Like other choses in action, their situs is that of their owner. His security and comfort given to him by government enable him to hold and enjoy them. Nor is it true that, as they are issued upon his whisky, they are in effect evidence merely of his title, as his deeds to his lands in a foreign state may be. Title deeds in this country are not such property as that they have an independent value, or a market value. The warehouseman who stores whisky becomes its bailee. He has a special property in it. He who lodged it there, exchanges it to the warehouseman for the latter's negotiable receipts, commercial paper, promises to redeem, and, independent of the receipts, the former owner no longer has the property in the whisky, any more than the mortgagee has the property in the mortgaged chattel. We are of opinion, and without hesitation hold, that warehouse receipts, wherever issued, and whatever they may represent, are intangible personal property, whose situs for purposes of taxation is the domicile of their owner. They may be and should be taxed at his domicile at such value as they may have had on the day fixed by the statute for listing property generally for taxation.

Wherefore the judgment is reversed, and cause remanded for proceedings consistent herewith.

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CASE 11.—MOTION BY J. M. ROBINSON, NORTON & CO., FOR DAMAGES ON A SUPERSEDEAS BOND EXECUTED IN AN APPEAL AGAINST CORSICANA COTTON FACTORY.—June 7.

Robinson, Norton & Co. v. Corsicana Cotton Factory

Motion in Appellate Court for damages on supersedeas bond.

Costs — Appeal — Affirmance — Undertaking — Damages.—A judgment ordering a party to pay a specific sum into court, and authorizing the adverse party to withdraw it as soon as paid, is a judgment for the payment of money, within Civ. Code Prac. Sec. 764, providing that, on the affirmance of a judgment "for the payment of money," the collection of which has been superseded, 10 per cent. damages on the amount superseded shall be awarded against appellant.

W. S. PRYOR and JAMES R. DUFFIN for appellant.

GREENE & VANWINKLE and THATCHER, GIFFORD & STEINFELDT for appellee.

OPINION OF THE COURT BY JUDGE HOBSON—Sustaining motion.

During the progress of the action, the property attached was sold. Appellant was the purchaser at the sale, and executed bond for the price, $730. In its final judgment, the court dismissed appellant's petition, discharged the attachment, ordered appellant to pay into court the amount of its bond, $730, and ordered that, as soon as the money was paid into court, the appellee might immediately withdraw it. Appellant appealed, superseding the judgment. The

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judgment was affirmed. J. M. Robinson & Co. v. Corsicana Cotton Factory, 124 Ky. 435, 99 S. W. 305, 30 Ky. Law Rep. 580. Appellee has entered a motion for damages on the supersedeas.

By section 764 of the Civil Code of Practice, 10 per cent. damages on the amount superseded shall be awarded against the appellant upon the affirmance of a judgment for the payment of money the collection of which has been superseded. The judgment here appealed from was a judgment for the payment of money by the appellant. Its collection was superseded. The order for the payment of the money into court, and its immediate withdrawal by appellee, was only a form of requiring the money to be paid by appellant to appellee. The fact that the receiver was to take the money from the appellant, and immediately pass it on to appellee, did not change the substance of the transaction. The receiver was only the medium through whom the money was to pass from appellant to appellee. Appellant, by reason of the supersedeas, kept the money, and had the use of it. The 10 per cent. damages are allowed on judgments for the payment of money, if superseded, to deter parties from refusing to pay over money pursuant to the judgment, and thus endangering the rights of the appellee. An order for the payment of money to the receiver is a judgment for the payment of money. The fact that payment is to be made to an officer makes it none the less a judgment for the payment of money, than if the payment is to be made to an individual.

An order for the distribution of a fund in court is not an order for the payment of money by the appellant. He does retain the use of the money by means of the supersedeas. It then remains in the custody

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of the court. So such orders have been held not judgments for the payment of money. But the judgment here superseded was literally a judgment for the payment of money, and damages on the supersedeas must be awarded.

Motion sustained.

CASE 12.—PROCEEDING BY COMMONWEALTH BY F. A. LUCAS, REVENUE AGENT, AGAINST THE CITY OF PADUCAH, TO ASSESS OMITTED PROPERTY.—June 7.

Commonwealth v. City of Paducah

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138 851

Appeal from McCracken Circuit Court.

W. M. REED, Circuit Judge.

From the judgment in the county court the commonwealth appealed to the circuit court and again appealed from the judgment of the circuit court.—Affirmed.

1. Taxation—Municipal Property.—A city's fire apparatus electric light plant, poles, wires, a house and lot, and other property used for public purposes, are not liable for State and county taxes.
2. Same—Assessment.—In a proceeding under the express terms of Ky. Stats., 1903, Sec. 4241, for the assessment for taxes of omitted property, on the Commonwealth's appeal from the county court's holding that none of the property was taxable, the circuit court properly refused to assess the portion it held liable to taxation; its certificate that that portion was liable being sufficient to warrant the county judge in assessing it.

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TAYLOR & LUCAS for appellant.

AUTHORITIES CITED.

1. Liability of municipal property to assessment for taxation: Sec. 170, Ky. Const.; Louisville v. Commonwealth, 1 Duval, 295; Commonwealth v. Makibben, County Judge, 90 Ky., 384; Barbour, Sheriff, v. Louisville B. of T., 82 Ky., 645; Covington v. Commonwealth, 19 Ky. Law Rep., 105; Clark v. Louisville Water Co., 90 Ky., 515; Board of Councilmen v. Commonwealth, 82 S. W., 1008; Newport v. Commonwealth, 90 Ky., 384; Commonwealth v. Louisville, 20 Ky. Law Rep., 893; Owensboro v. Commonwealth, 20 Ky. Law Rep., 1281; Negley, Sheriff, v. Henderson, 22 Ky. Law Rep., 912; Negley v. Henderson, 21 Ky. Law Rep., 1394; Commonwealth v. Lexington Cemetery Co., 70 S. W., 280.

2. Burden is on party claiming exemption to allege and prove facts entitling him to same: Cooley on Taxation, 3d Ed., 356; Board of Trustees v. Bell Co. C. & I. Co., 16 Ky. Law Rep., 283; Newport v. Masonic Temple Assn., 103 Ky., 592; 20 Ky. Law Rep., 266; Bradley v. McAtee, 7 Bush, 667; Louisville Canal Co. v. Commonwealth, 7 B. Mon., 160; Deposit Bank of Owensboro v. Daviess Co., 102 Ky., 174; 19 Ky. Law Rep., 248; German Bank v. Louisville, 22 Ky. Law Rep., 99.

3. Should the circuit court have remanded this case to the county court? Commonwealth v. Reed, 89 S. W., 294.

JAMES CAMPBELL, JR., for appellee.

Our contention is that the action of the circuit court in certifying its judgment to the county court was tantamount to and had the same effect as if it had been remanded, for the remand could not have directed to do more than the circuit court had already done—direct that a portion of the property was subject to taxation: City of Owensboro v. Commonwealth, 49 S. W., 320.

OPINION OF THE COURT BY JUDGE BARKER—Affirming.

This proceeding was instituted by the auditor's agent in the county court of McCracken county, under section 4241 of the Kentucky Statutes of 1903, for the purpose of assessing as omitted property certain

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specifically described property belonging to the city of Paducah, for State and county purposes for the years 1901, 1902, 1903, 1904, and 1905. The county court adjudged that none of the property was liable for taxation. From that judgment the Commonwealth appealed to the McCracken circuit court, and, the case being submitted, it was held that certain parts of the property were subject to taxation, and, as the city is not complaining, this part of the judgment may be dismissed from further attention.

The court further adjudged that the fire apparatus, electric light plant, poles and wires, the house and lot on Kentucky avenue between Third and Fourth streets, and the personal property belonging to the city of Paducah, and described in plaintiff's statement, are not liable for taxation for State and county purposes for the years mentioned. It is not disputed that the property in question belongs to the city of Paducah, or that it is used for public purposes; but the State contends that it is owned and used by the city in its local municipal capacity, as contradistinguished from its governmental capacity. The question presented was involved in Board of Council of City of Frankfort v. Commonwealth, 94 S. W. 648, 29 Ky. Law Rep. 699, and is controlled by that opinion. It is not necessary to reproduce the reasoning of the opinion. In it are reviewed all of the cases from this court bearing on the subject in hand, and the conclusion reached upholds the judgment of the circuit judge. We think the circuit court correctly refused to assess the property which it held liable for taxation. Its certificate to the county court that the property is liable for taxation is amply sufficient to warrant the county judge in assessing it at its fair cash value, and this will be done.

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For these reasons, the judgment of the circuit court is affirmed.

The Chief Justice and Nunn and Carroll, JJ., dissenting to so much of the opinion as affirms the exemption of the electric light plant from taxation.

CASE 13.—ACTION BY E. T. STURGES' ADMINISTRATOR AGAINST WILLIAM B. STURGES AND OTHERS TO SETTLE THE ESTATE OF HIS INTESTATE.—June 7.

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e135 748

Sturges, Etc., v. Sturges, Etc.
Same v. Sturges' Administrator, Etc.

Appeal from Jefferson Circuit Court.

2nd Chancery Division, SAMUEL B. KIRBY, Judge.

From the judgment the defendants, except L. M. Sturges, appeal.—Affirmed.

1. Wills—Property Passing—Damages for Death—Under Const. Sec. 241, and Ky. Stats., 1903, Sec. 6, recovery may be had for wrongful death, and the proceeds become a part of decedent's estate, where he leaves no wife, parents, or children, to go to his relatives after the payment of his debts. Under Ky. Stats., 1903, Sec. 4839, a will takes effect as if executed immediately before the testator's death. Sec. 4825 authorizes one to will any estate he may be entitled to at his death. Held, that damages recovered by an administrator for decedent's wrongful death do not pass under the will.
2. Executors—Payment of Debts—Property Available—Right of Action for Causing Death.—Under the express terms of Ky. Stats., 1903, Sec. 6, recovery for wrongful death is subject to the payment of decedent's debts where he leaves no wife, par-

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ents, or children, and is properly applied to the discharge of lien debts against devised property.

3. Insurance—Mutual Benefit Association—Charter—Amendment. —The Legislature could amend the statute under which a mutual benefit insurance association was organized so as to limit the scope of business authorized under its charter in so far as the amendment did not impair the obligation of existing contracts.

4. Same—Who May be Beneficiary.—In 1894 a mutual benefit association was chartered to insure its membership and to pay the death benefits to the members' families, executors, etc. House Bill No. 370, Sec. 6 (as amended 97 Ohio Laws, p. 422), provides such associations shall pay the benefits only to the family, heirs, etc. Held, that the association's charter was amended by the act, and that policy contracts entered into between it and its members after the act took effect must conform to it, and hence insured could not validly designate his estate as beneficiary.

5. Same—Void Designation—Right of Former Beneficiary.—A beneficiary's rights under an insurance policy are unaffected by a void attempt to substitute beneficiaries.

W. PRATT DALE for appellees.

1. The sum of $4,000.00 collected as damages passes under the will of the decedent as other personal estate.

(a) History of legislation on above subject: General Statutes, c. 57, sec. 1; General Statutes, c. 57, sec. 3; Givens v. Ky. Cent. R. R. Co., 89 Ky., 231; C., N. O. & T. P. R'y Co. v. Pruitt, 92 Ky. 223; Schoolcraft v. L. & N. R. R. Co., 92 Ky., 233; Newport News, etc., R. Co. v. Deutzel, 91 Ky., 48; Henderson's admr. v. Ky. Cent. R. R. Co., 86 Ky., 389; Jordan's admr. v. C., N. O. & T. P. R. R. Co., 89 Ky., 40; Constitution of Kentucky, sec. 241; Debates in Constitutional Convention, vol. 4, pp. 4715-4720; Thomas' admr. v. Royster, 98 Ky., 206; Wright v. Wood, 96 Ky., 56.

(b) Argument and authorities: Givens v. Ky. Cent. R. R.Co., 89 Ky., 231; L. & N. R.R. Co. v. McElwain, 98 Ky, 700; Marvin v. Maysville St. R'y Co., 49 Fed. Rep., 436; Berg v. Berg's admr., 105 Ky., 80; Carlson v. Oregon, etc., R'y Co., 28 Pac. Rep., 499; Holmes v. Oregon & Cal. R'y Co., 5 Fed Rep., 543; Ladd v. Foster, 31 Fed. Rep., 827; Holland v. Brown, 35 Fed. Rep., 43; Philo v. I. C. R. R. Co., 33 Ia., 47; Roach v. Imperial Mining Co., 7 Fed. Rep., 698; Little Rock, etc., R'y Co. v. Townsend, 41 Ark., 382; B. & O. R. R. Co. v. Wrightman, 29 Gratt., 431; Harper v. N. &

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W. R. R. Co., 36 Fed. Rep., 104; Ky. Stats., sec. 4825; Ky. Stats., 1043.

2. If said fund does not pass under the will, then it is first liable to be subjected to the payment of debts and must be exhausted before subjecting any of the estate passing under the will: Givens v. Ky. Cent. R. R. Co., 89 Ky., 231; Marvin v. Maysville St. R'y Co., 49 Fed. Rep., 436; Am. & Eng. Ency. of Law, 2d ed., vol. 8, p. 956; O'Malley's admr. v. McLean, 23 Ky. Law Rep., 2258; Minor's Institutes, Vol. 3, p. 584; Underhill on Wills, sec. 373, p. 515; Am. & Eng. Ency. of Law, 2d ed., vol. 19, p. 1300; McCampbell v. McCampbell, 5 Litt., 95; Marsh v. Marsh, 10 B. M., 360; Broadwell v. Broadwell's admr., 4 Met., 291; Alexander v. Waller, 6 Bush., 330; Palmer v. Armstrong, 2 Dev. Eq. (N. C.), 268; Swann v. Swann, 5 Jones Eq., 299; Whitehead v. Gibbons, 10 N. J. Eq., 237; Ky. Stats., sec. 1403.

Real estate devised should be exonerated from all liens and mortgages out of the personal estate: Page on Wills, sec. 765, p. 908; Higbie v. Morris, 53 N. J. Eq., 173; Slack v. Emery, 30 N. J. Eq., 458; in re Riegelman's est., 174 Pa. St., 476; Gould v. Winthrop, 5 R. I., 319; Turner v. Laird, 68 Conn., 198.

3. The sum of $3,000.00 collected from two policies of insurance was properly distributed to the appellee in his individual capacity: Niblack on Mut. Ben. Societies, sec. 230; Joyce on Insurance, vol. 2, sec. 753; Cooley's Briefs on Insurance, vol. 4, p. 3776; Elsey v. Odd Fellows, etc., 142 Mass., 224; 7 N. E., 844; Smith v. Boston & Maine R. R. Assn., 168 Mass., 213; 46 N. E., 626; Supreme Commandery, etc., v. Merrick, 163 Mass., 374; 40 N. E., 183; Love v. Clune (Colo.), 50 Pac. Rep., 34; Supreme Council, etc., v. McGinniss (Ohio), 53 N. E., 54; Grace v. Northwestern, etc., Assn., 87 Wis., 562; 58 N. W., 1041; Kult v. Nelson, 53 N. Y. Supp., 95; DiMessiah v. Gern, 30 N. Y. Supp., 824; Brown v. Grand Lodge, etc., 208 Pa., 101; 57 Atl., 176; Coyne v. Bowe, 48 N. Y. Supp., 937; affirmed in 161 N. Y., 633; 57 N. E., 1107; Ky. Mas. Mut. Life Ins. Co. v. Miller, 13 Bush., 489; Lovett v. Lovett, 26 Ky. Law Rep., 300; Leaf v. Leaf, 92 Ky., 168.

The appellee was not estopped from asserting his claim: Faris v. Dunn, 7 Bush., 287; Seibert v. Bloomfield, 23 Ky. Law Rep., 646; Hilton v. Colvin, 25 Ky. Law Rep., 1809; Bigelow on Estoppel, p. 445; Am. & Eng. Ency. of Law, 2 ed., vol. 11, p. 387.

4. If the designation of the appellee, L. M. Sturges, as the beneficiary of said policies, was revoked by the subsequent designation by the decedent of his estate, then the proceeds of the policies become a part of the personal estate of the deceasd and distributable in the same manner as any other personal estate:

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Basye v. Adams, 81 Ky., 368; Gaines v. Gaines, 99 S. W., 600; Revised Statutes of Ohio, sec. 3630.

J. MORTON MORRIS for appellant, AMANDA STURGES.

STATEMENT OF FACTS—CONTENTIONS OF THIS APPELLANT.

1. Proceeds of policies of insurance payable to the estate of E. T. Sturges should have been distributed as any other estate left by him: Sec. 3630, Revised Statutes of Ohio; Basye v. Adams, 81 Ky., 368; Briggs v. Earl, 139 Mass., 473; 1 N. E., 847; Amer. Legion of Honor v. Perry, 140 Mass., 580; 5 N. E., 634; Addison v. Association, 144 Mass., 591; 12 N. E., 407; Brierley v. Equitable Aid Union, 170 Mass., 218; 48 N. E., 90.

(a) Rights of beneficiaries are vested where no power reserved to change the beneficiary: Basye v. Adams, 81 Ky., 368; Weisert v. Muehl, 81 Ky., 336; Nuckols v. Mutual Benefit Society, 16 Ky. Law Rep., 270; Ky. Mutual Life Insurance Co. v. Miller, 13 Ky. Law Rep., 489; Duvall v. Goodson, 79 Ky., 294.

(b) Where, however, the by-laws of the company permit a change to be made, the interest of the beneficiary is not vested. It is only an expectancy which will be defeated by a subsequent change: Hopkins v. Hopkins, 92 Ky., 325; Wirgman v. Miller, 98 Ky,. 620; Wrather v. Stacy, 82 S. W., 420.

2. The Act of April 27, 1896, of the State of Ohio, was not intended to repeal or amend the statute under which this company was organized, and did not limit the classes of beneficiaries named in the charter of the company: Sherman v. Commonwealth, 82 Ky., 102; Commonwealth v. Wetherbee, 105 Mass., 149; Farmer v. State, 7 S. W. (Tex.), 220; Goodman v. Jedidjah Lodge (Md.), 9 Atl., 13; Bolton v. Bolton, 73 Me., 229; Erdman v. Mut. Ins. Co., 44 Wis., 376; Supreme Commandery v. Ainsworth, 71 Ala., 443; State v. Critchett (Minn.), 32 N. W., 787; Washington Life Ins. Co. v. Glover, 25 Ky. Law Rep., 1327; Mut. Life Ins. Co. v. Cohen., 179 U. S., 262.

3. Said Act of April 27, 1896, could not be retroactive, even if intended to amend the charter of this company: Constitution of Ohio, art. 2, sec. 28; Dartmouth College v. Woodward, 4 Wheat., 636; Deposit Bank v. Daviess County, 102 Ky., 184.

4. No person had any insurable interest in the life of E. T. Sturges except himself, and his estate was the only beneficiary which could be legally designated: Basye v. Adams, 81 Ky., 368; Wolf v. Pearce, 20 Ky. Law Rep., 296; Caudell v. Woodward, 96

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Ky., 651; Van Bibber v. Van Bibber, 82 Ky., 347; Wiegelman v. Bronner, 96 Ky., 646; Beard v. Sharp, 100 Ky., 606; Embry's admr. v. Harris, 107 Ky., 61; Continental Life Ins. Co. v. Volger., 89 Ind., 572; 46 Am. Rep., 185; Burton v. Conn. Mut. Life Ins. Co., 21 N. E., 746; Conn. Mut. Life Ins. Co. v. Schaefer, 94 U. S., 460; Washington Central Bank v. Hume, 128 U. S., 204; Union Fraternal League v. Walton, 34 S. E., 317; Loomis v. Insurance Co., 6 Gray, 379; Metropolitan Life Ins. Co. v. Brown, 65 N. E., 909; Cooley's Briefs on Insurance, vol. 1, p. 252.

5. It is not necessary for a legatee under a will to have an insurable interest in the life of the testator: Weil v. Trafford, 8 Tenn. Chan., 108; Catholic Knights of America v. Kuhn, 91 Tenn., 214; Lamont v. Grand Lodge, 31 Fed. Rep., 181; Harding v. Littlehale, 150 Mass., 100.

6. If any doubt exists as to the disposition of the proceeds of the policies, the evident intent of the decedent should prevail: Absalom W. Gaines v. Laura Gaines (Decided February 6, 1907); Bacon on Benefit Societies, sec. 255; Cooley's Briefs on Insurance, vol. 1, p. 701; Elsey v. Odd Fellows, 142 Mass., 224; Amer. Legion of Honor v. Perry, 140 Mass., 580; Cooley's Briefs on Insurance, vol. 1, p. 643; Morton v. Supreme Council, 100 Mo. App., 76; 73 S. W., 259; People v. Commercial Alliance Ins. Co., 48 N. Y. Supp., 389.

JACOB SOLLINGER for appellants.

P. J. COSGROVE, S. R. CREWDSON, C. S. WILTSIE of counsel.

POINTS AND AUTHORITIES.

1. The sum of three thousand dollars ($3,000), proceeds of two policies in the Locomotive Engineers' Mutual Life and Accident Insurance Association upon the life of the decedent, E. T Sturges, should pass to the heirs at law of the decedent, because the statute law of the State of Ohio, under which the said Locomotive Engineers' Mutual Life and Accident Insurance Association was chartered, limited the beneficiaries of fraternal beneficiary societies to the "families, heirs, blood relatives, affianced husband or affianced wife or persons depending upon the members:" Ohio Statutes, sec. 3630; Ohio Act of April 27, 1896, House Bill No. 370.

(1) Is the Locomotive Engineers' Mutual Life and Accident Insurance Association a fraternal beneficiary association, and was it such on January 1, 1901, and on November 13, 1903?

(2) Was it operating under and recognized as such an associa-

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tion under the Act of April 27, 1896, on January 1, 1901 and on November 13, 1903?

(3) Was the Act of April 27, 1896, an amendment to the statutory law of Ohio on fraternal beneficiary societies? If so, in what manner did it change the existing laws?

(4) Did the Act of April 27, 1896, affect the charter of the Locomotive Engineers' Mutual Life and Accident Insurance Association? If so, was that act retroactive or unconstitutional?

(5) Were persons joining that association after that date bound by that act?

(6) Is Amanda Sturges of the classes prescribed by the laws of Ohio? Can the law be defeated by a general devise? What becomes of the fund?

(a) The designation by the decedent of "his estate" as the beneficiary of these policies was a valid designation: Bromley's admr. v. Washington Life Ins. Co., 92 S. W., 17; Bayse v. Adams, etc., 81 Ky., 268; in re Smith, 81 N. Y. Sup., 725; Sulz v. M. R. L. F. Asso., 145 N. Y., 563; Pace v. Pace, 19 Fla., 438; 3 Am. & Eng. Enc. of Law, 2 ed., 978; Norwich Union Fire Ins. Co. v. Prude et al (Ala.), 40 S. Rep., 322; Globe Ins. Co. v. Boyle, 21 Ohio Stats., 119; Wolf v. Pierce, 20 Ky. Law. Rep., 296; Loos v. John Hancock Ins. Asso., 41 Mo., 538; Schultz v. Citizens' M. L. Ins. Co., 59 Minn., 308; Warneky v. Lembecca, 71 Ill., 91; Griswell v. Sawyer, 125 N. Y., 411; Clinton v. Hope Ins. Co., 45 N. Y., 460 Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591; Moale et al v. Mayer, etc., of Baltimore, 61 Md., 238; Joyce on Ins., vol. 1, sec. 310; Insurance Co. v. Bledsoe, 52 Ala., 538; Hendricks v. Thornton, 45 Ala., 299; Knickerbocker Life Ins. Co. v. Weitz et al, 99 Mass., 157; Bishop v. G. L. E. O. of M. A., 112 N. Y., 627; Janda v. Bohemian Roman Catholic First Central Union, 71 App. Div., 150; Kunkel v. Workman's S. and D. Benefit Fund, 68 App. Div., 385; Hellenberg v. I. O. of B. B., 94 N. Y., 580; Fink v. Fink, 171 N. Y., 618; 64 N. E., 506; Thomas v. Thomas, 131 N. Y., 205; 30 N. E., 61; 27 Am. St. Rep., 582; Gundlach v. Germ. Ins. Co., 4 Hun. 339-341; Ballou v. Gile, 50 Wis., 614; 7 N. W., 561; Durian v. Central Verein, 7 Daly, 168; Arthur v. Odd Fellows' Ben. Assn., 29 Ohio Stats., 557; Greeno v. Greeno, 23 Hun., 478-482; Kentucky M. M. L. I. Co. v. Miller's admr., 12 Bush., 489; City of New Orleans v. estate of Samuel Stewart, 28 La Annual Rep.; Sprawl v. Lawrence, 33 Ala., p. 686; Commonwealth v. Kimball, 24 Peck, 370.

(b) The attempted devise of the proceeds of these policies to decedent's sister-in-law (no blood relation) was void because she did not come within the classes limited by the laws of the State of Ohio.

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2. The appellee, Luther M. Sturges, by his conduct in this action, in insisting that the proceeds of these policies should pass to Amanda Sturges under the will, waived any rights (if any) which he may have had to the proceeds of these policies, and is now estopped from setting up any claim to the same in his individual capacity: J. W. Mount v. L. & N. R. R. Co., 2 Ky. Law Rep., 221; National Bank of Stanford v. Reed, 4 Ky. Law Rep., 346; Hargis v. Burgin, 4 Ky. Law Rep., 627; Murry v. Bright, 9 Ky. (2 A. K. Marshal), 146; Pollard v. Taylor, 5 Ky., (2 Bibb), 234; Gentry v. Barnett, 22 Ky. (6 T. B. Monroe), 113; Phillips on Code Pleadings, p. 255, sec. 273; Phillips on Code Pleadings, par. 434, p. 456; Bacon on Benefit Societies and Life Ins., par. 420; Robbins v. Treadway, etc., 25 Ky. (2 J. J. Marshall), 540; Edward A. Ferguson, etc., v. Solomon Meredith, etc., 68 Sup. Ct. Rep., 604 (1 Wall, 25-43).

3. Query. If the heirs at law are entitled to the proceeds of these two policies are they entitled to the same with interest from the date they were paid to administrator?

Civil Code, sec. 90; Alexander v. Grand Lodge, 119 Ia., 519; Knights Templars v. Graton, 209 Ill., 550; Supreme Lodge K. & L. of H. v. Rehg, 116 Ill. App., 59; Supreme Lodge Knights of Honor v. Lapp's admr., 74 S. W., 656; Gore v. Buck, 17 Ky., 209; Carr's Ex'r. v. Robinson, 71 Ky., 269; Reynolds v. Powers, (Ky.) 29 S.W., 299; Cooke v. Clark's Committee, (Ky.) 51 S. W., 316.

4. The sum of four thousand dollars recovered from the Louisville & Nashville Railroad Company for the death of the decedent by wrongful act does not pass under his will, and should not go to increase the value of the devise to the sole and general devisee.

(a) It does not pass under the will: Ky. Stats., sec. 6; City of Chicago v. Major, 18 Ill. Rep., 358; L. N.A. & C. P. R. R. v. Doodykoontz, 119 Ind., 113; Caruthers' Trustee v. Neal, etc., 12 Ky. Law Rep., 567; O'Malley's admr. v. McLean, etc., 23 Ky. Law Rep., 2258; Needham v. Grand Trunk R. R. Co., 38 Vt., 294; Steel admr. v. Kurtz, 28 Ohio, 195; Jeff. R. v. Swain, 36 Ind., 485; Chicago R. R. Co. v. Morris, 26 Ill., 402; Snedecker v. Snedecker, 164 N. Y., 63.

(b) This damage fund is not primarily liable for all the debts against decedent's estate to the exclusion of his general estate: Black on Interpretation; Endlich on Interpretation.

5. In a general devise the words "my estate" mean the decedent's net estate after the payment of his debts and the costs of administration: Smith v. Terry, 43 N. J. Equity Rep., 666; Reed v. Addington, 4 Ves., 575; Bardwell v. Bardwell, 10 Pick., 19; Briggs v. Hosford, 22 Pick., 288; Trustees of Jefferson College v.

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James C. Dickson et al, 1st Freeman (Miss. Chancery Rep.), 483; Ky. Stats., sec. 2084.

6. In a general devise mortgage and lien debts are not properly claims against the decedent's general or personal estate: Ency. of Law and Procedure, p. 464 (G); Fallon v. Butler, 21 Cal., p. 24; Toulouse v. Burkett, 10 Pac. Rep.; Fish v. De Laray, 66 N. W., p. 265; Smith v. Gilman, 80 Ala., p. 300; Miller v. Helm, 2 S. & M., p. 687.

7. Appellants are entitled to attorneys' fee and expenses of this contest out of the funds in controversy: Louisville Presbyterian Theological Seminary v. Botto, 80 S. W., 177.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

The decedent, E. T. Sturges, a bachelor, who was a railroad engineer was killed in a collision of his engine with another train in the month of November, 1903. He had previously made and published his last will and testament, under which he devised and bequeathed to his sister-in-law, Amanda Sturges, all of his estate and property of every kind, but not naming it specifically. The heirs at law of E. T. Sturges were a full brother, the appellant William B. Sturges, a half-sister, the appellant Manabel P. Sturges, and a half-brother, appellee L. M. Sturges. The decedent's mother and father were both dead. The real estate owned by the decedent consisted of a lot upon which he was building a house, but which had not been quite completed at the time of his death. He also held the title to the lot on which he lived with the family of L. M. Sturges, the appellee. The decedent had mortgaged both lots for the purpose of obtaining funds to erect the building on the vacant lot. He owned personal estate to the amount of about $900. The mortgage debt and the balance owing to the contractor amounted to about $2,600. He had an

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insurance upon his life in the Travelers' Insurance Company for $1,000. It was an accident policy, and was payable to L. M. Sturges individually. He also had two policies of insurance of $1,500, each in the Locomotive Engineers' Mutual Life & Accident Insurance Association. These last-named policies were taken out on the 1st of January, 1901. His half-brother, L. M. Sturges, was named as the beneficiary of each of them. The decedent's will was executed 24th of September, 1902. On the 23d day of October, 1903, he changed the beneficiary in both the last-named policies, and made them payable to his estate. The administrator of the decedent presented a claim for damages against the railroad company in whose service decedent lost his life because of its negligent destruction. The claim was compromised by the railroad company's paying the administrator $4,000 in settlement of it. This action was brought by the administrator against the devisees and the heirs at law of decedent and the lien creditors to settle the estate. The devisee, Amanda Sturges, claimed the whole of the personal estate under the will, including the $4,000 collected from the railroad company, and the $3,000 collected from the Locomotive Engineers' Mutual Life & Accident Insurance Association. Her husband, L. M. Sturges, claimed the $3,000 of insurance just mentioned. Decedent's brother, William B. Sturges, and his half-sister, Manabel Sturges, claimed that the $3,000 of insurance did not pass under the will, because the charter of the insurer restricted the beneficiaries to those who were the blood relations of the insured; consequently, that it was not competent for the insured to name any other beneficiary than blood relations, and that his attempt to do so by his will, if it should be construed that the

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will embraced the insurance, was void. They also claim that under the statutes the recovery from the railroad company for the destruction of the life of the decedent was not personal estate which he had the right to dispose of by will, but it passed under the statutes of this State to his heirs at law. The circuit court adjudged the $3,000 of insurance to L. M. Sturges, the beneficiary originally named in the policies. It adjudged that the $4,000 recovered from the railroad company constituted a part of the personal estate of the decedent, which under the statute in this State was applicable, first, to the payment of the costs of administration, and then to the payment of his debts. Among the debts to which the $4,000 was applied was the mortgage debt upon the real estate, and the balance of the builder's claim above alluded to. As this real estate had been devised to Mrs. Amanda Sturges by the will of the decedent, it results that the application of the money recovered by way of damages to the satisfaction of these debts went to relieve the devised real estate from the burden which it bore at the time the will took effect. Wm. B. Sturges and Manabel Sturges have prosecuted this appeal, in which they complain that the judgment was wrong in each of the particulars mentioned. Mrs. Amanda Sturges also prosecutes an appeal from the judgment because the court adjudged the $3,000 of insurance to her husband, L. M. Sturges, instead of to her.

We will first take up the item of $4,000 collected from the railroad company. This fund was recovered and is distributable under the provisions of section 6 of Kentucky Statutes of 1903, which is as follows: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful

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act, then in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is wilful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased. The amount recovered, less funeral expenses and the cost of administration, and such costs about the recovery, including attorney fees as are not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order, viz: (1) If the deceased leaves a widow or husband, and no children or their descendants, then the whole to such widow or husband. (2) If the deceased leaves either a widow and children or a husband and children, then one-half to such widow or husband and the other one-half to the children of the deceased. (3) If the deceased leaves a child or children, but no widow or husband, then the whole to such child or children. If the deceased leaves no widow, husband or child, then such recovery shall pass to the mother and father, of deceased, one moiety each, if both be living; if the mother be dead and the father be living, the whole thereof shall pass to the father; and if the father be dead and the mother living, the whole thereof shall go to the mother; and if both father and mother be dead, then the whole of the recovery shall become a part of the personal estate of the deceased; and after the payment of his debts, the remainder, if any, shall pass to his kindred more remote than those above named, as is directed by the general law on descent and distribution." As the decedent

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was never married, and therefore left no child or children, nor father or mother, surviving him, the recovery in this particular case under the statute became a part of his personal estate.

At common law there was no recovery for negligence resulting in death. The right of action of the decedent died with him. The English statute, commonly known as "Lord Campbell's Act," was the first legislation allowing a recovery for death resulting from negligence. That act gave a right of action whenever death was caused by wrongful act, negligence, or default, and provided that the proceeds of the recovery were for the exclusive benefit of certain designated members of the family of the deceased and exempt from the payment of his debts. Similar statutes have since been enacted in probably every state of the Union. Most of them are framed closely upon the same lines as laid down in Lord Campbell's act, and restrict the recovery to the benefit of the wife or kindred of the deceased. Other statutes have departed from that act, and make the recovery either a part of the deceased's personal estate, or a part of the deceased's estate upon the failure of certain specific kindred. It will be observed that the Kentucky statute follows more closely the idea last named. Before the adoption of the present Constitution, no recovery was allowed in this State for the negligent destruction of lives of employes of railroads except for wilful neglect, and then the recovery was restricted to punitive damages. Sections 1, 3, 57, Gen. St. Section 241 of the Constitution of 1891 provides as follows: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corpora-

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tions and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made the same shall form part of the personal estate of the deceased person.' It was in pursuance of this provision of the Constitution that section 6 of the Kentucky Statutes above quoted was enacted. While it is true that the statutes, as well as the Constitution, provide that the recovery shall in certain contingencies become a part of the decedent's personal estate, it does not follow that such recovery ever constituted any part of the estate which belonged to the decedent, or that it is such an estate as he may dispose of by his last will. Section 4839, Ky. St. 1903, is: "A will shall be construed, with reference to the real and personal estate compromised in it, to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will." Section 4825, Ky. St. 1903, provides: "Every person of sound mind, not being under 21 years of age, nor a married woman, may by will dispose of any estate, right or interest in real or personal estate that he may be entitled to at his death, which would otherwise descend to his heirs or pass to his personal representatives; and though he may become so entitled after the execution of his will."

This statute was in force long before the right of recovery for the negligent destruction of life was allowed; nor has it been changed since except that now a married woman is permitted to make a will. Broadly, it gives to every person the right to dispose

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by will of what he owned at his death that he might have disposed of otherwise. But damages recoverable from a tort-feasor because of the negligent destruction of the life of a person cannot be said to have ever belonged to such person. In the nature of the thing, it was impossible for him to have had a property interest in such damages, or to have made any contract with reference thereto, or to have anticipated them. It is true section 241 of the Constitution and section 6 of the Kentucky Statutes makes such recovery personal estate; but this does not and cannot confer it as property upon the deceased so as to be effective for any purpose in his life time. These provisions making the recovery a part of the estate of the deceased are manifestly for the purpose of designating the manner of its descent, of regulating the manner of its distribution, of prescribing the persons who are to take and enjoy the recovery. Such damages are inflicted upon the wrongdoer partly as a punishment for his act, and then as a compensation to those who have suffered presumably direct and pecuniary loss from the destruction of the life. These are deemed by the Legislature to be first the widow or husband, and then the children of the deceased. If there be no widow or husband or children, then his father and mother. But, if all these relations, standing in such close proximity to the deceased as to make it reasonably certain that they are directly affected in a pecuniary way by the destruction of his life, are not in existence, then, and not until then, does the recovery become a part of his personal estate. It will be observed that the statutes subject the recovery in any event first to the payment of the funeral expenses and cost of administration, and then to the costs incurred in the recov-

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ery of the damages including counsel fees. What may be left after the discharge of these items is given by the statutes, not to the estate of the deceased, but to those relations specifically designated in the statute. In default of such relations, the statute then makes the recovery a part of the decedent's personal estate, and subjects it expressly to the payment of his debts. No part of it is liable to the payment of his debts unless there is a failure of the relations of the degrees above named. After the payment of his debts, what may be left is then given to his kindred more remote than those above named, and it is given in the proportion and to the persons who would take under the laws of descent and distribution as in case of other personal estate undevised. Thus we see that the statute creates a peculiar estate, and provides to whom it shall go. It never goes to the decedent. It has never been in his control, nor was it competent, under the language of the statute, for him, by will or otherwise to affect or contravene the policy of the Legislature in creating the right of recovery, and designating who should be its beneficiaries. These persons get this recovery, not from the decedent, but from the statute. They get it, not because it was the property of the decedent which the statute allows them to inherit, but because the law allows them to recover it from another for that other's negligent act which has presumably and in contemplation of law involved some loss upon the recipients named.

We therefore hold that the damages recovered from the railroad company did not pass under the will of the decedent.

The next question with respect to this item is: Was it subject to the payment of the debts of the decedent, and ought it to have been applied to the

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discharge of the lien debts against the real property which he had devised? It would seem a sufficient answer to this proposition that the statute expressly makes the recovery liable to the payment of the decedent's debts. In a state of case such as we have here, whether his debts are liens or not does not seem to affect the question. They are nevertheless his debts. The creditor is entitled to have them paid out of the recovery from the railroad company. The statute also requires it. And at the common law, in the absence of a statute, it would be so applied, if it were a part of the personal estate of the decedent. Personal estate undevised is applied to the payment of debts before any other estate is. 3 Minor's Institutes, 584; McCampbell v. McCampbell, 5 Litt. 95, 15 Am. Dec. 48; Marsh v. Marsh, 10 B. Mon. 360; Broadwell's Adm'r, 4 Metc. 291; Alexander v. Waller, 6 Bush, 330; Page on Wills, section 765.

The next item to be disposed of is the insurance collected from the Locomotive Engineers' Mutual Life & Accident Insurance Association. This concern was an Ohio corporation, formed in the year 1894, to prosecute the business of life and accident insurance on the assessment plan. In its charter was this provision: "The purpose for which said corporation is formed is to transact the business of life and accident insurance on the assessment plan for the purpose of mutual protection and relief of its members and for the payment of stipulated sums of money to the families, heirs, executors, administrators, or assigns of deceased members of said association." The association was incorporated under the general laws of the State of Ohio. Its power is derived particularly under section 3630 of the Revised Statutes of Ohio, which reads as follows: "A company or

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association may be organized to transact business of life or accident or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families, heirs, executors, administrators or assigns of the deceased members of such company or association, as the member may direct, in such manner as may be provided in the by-laws, and may receive money either by voluntary donation or contribution, or collect the same by assessment on its members, and may accumulate, invest, distribute, and appropriate the same in such manner as it may deem proper.' In 1896 the Legislature of Ohio enacted a statute, known as "House Bill No. 370" (92 Ohio Laws, p. 360), entitled "An act regulating fraternal beneficiary associations," etc. Its first section reads: "Any corporation, society, order or voluntary association without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government and which shall make provision for the payment of death benefits, is hereby declared to be a fraternal beneficiary association." And its sixth section (as amended 97 Ohio Laws, p. 422) reads: "The payment of death benefits shall be confined to the family, heirs, relatives by blood, marriage or legal adoption, affianced husband or affianced wife, or to a person or persons dependent on the member."

The Locomotive Engineers' Mutual Life & Accident Insurance Association, after the adoption of the last-named act, applied to the insurance commissioner of Ohio, and was by him granted a license to transact business under its provisions, and has since

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that time operated alone under its provisions. It has been treated by the association and by the insurance department as classified properly and exclusively under the act of April 27, 1896. The association was a corporation without capital stock, carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government. It made provision for the payment of death benefits. Therefore it comes clearly within the description of those corporations and societies which by the act were classified as fraternal beneficiary associations. It was competent, undoubtedly, for the Legislature of Ohio to amend the original charter of the association, or to amend the statute under which it was organized so as to limit the scope of the business authorized to be done under its charter, especially in so far as this amendment did not impair the obligation of any contract already assumed by the association to its members or others. When the Legislature of Ohio adopted the act of 1896, known as "House Bill No. 370," it classified all those corporations previously organized under its laws transacting the business of life and accident insurance on the assessment plan in so far as they constitute fraternal beneficiary associations. This, we think, it was competent for the Legislature to have done, and to have provided, as it did in section 6 above quoted, that the beneficiaries should be only a certain class of persons. Defendant E. T. Sturges did not become a member of the association until after the passage of the act of 1896. Therefore there was no contract between him and the association whose obligation could have been impaired by the change in the law. His contract of

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insurance with the association was made at a time and under provisions of the statute which limit the association to paying death benefits to the family, heirs, relatives by blood, marriage or legal adoption, and the affianced husband or affianced wife or person or persons dependent on the member. It was therefore competent for the association and the insured to have contracted that L. M. Sturges, the half-brother of the insured, should be the beneficiary of the policies, and, while the insured had the right to change the beneficiary, the one substituted must of necessity have belonged to the class permitted by the statute, else the attempted change would be void. It was not competent, then, for the insured to have designated his estate as the beneficiary of the policies. "The rule requiring beneficiaries to belong to the class prescribed in this statute refers to the statute of the State where the society is domiciled, and, if the certificate is issued in another state, the beneficiaries may be such as are permitted by the society's domicile, even though they would not be lawful beneficiaries in the foreign state." 3 Am. & Eng. Encyc. 961 (2d Ed.); United Order, etc. v. Merrick, 165 Mass. 421, 43 N. E. 127. As was said by this court in Van Bibber's Adm'r v. Van Bibber, 82 Ky. 356, 6 Ky. Law Rep. 393: "The certificate of membership constitutes the contract; but it is to be construed and governed by the company's charter. In fact, it may be said that the charter is a part of the contract; and, if it declares who, in a certain event, shall be the beneficiary, the parties cannot alter this legislative direction, because neither the company nor the insured can do anything in violation of it. ' Wist v. Grand Lodge, A. O. U. W., 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; State v. Mutual Protective

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Association, 26 Ohio St. 19; Weigelman v. Bronger, 96 Ky. 134, 28 S. W. 334, 16 Ky. Law Rep. 40.

Appellant's contention is that, because the attempted change of the beneficiary by the insured was void on the ground that it was incompetent for him to substitute his estate as the beneficiary under the laws of Ohio and the charter of the company, it operated as a revocation of the original designation, which would leave the fund to be distributed among the blood relations who were the heirs at law of the deceased. In 4 Cooley's Brief's on Insurance, p. 3776, the rule on this subject is thus stated: "If, however, the attempted change is invalid and ineffectual for any reason, the rights of the original beneficiary are not affected, and the original designation remains in force." It seems to us that that must be the sound rule, because otherwise an act inseparable would be held to be valid for one purpose, though invalid for the purpose for which it was intended. The result would be to disappoint every manifest intention of the actor and to substitute beneficiaries for his bounty whom he never contemplated by any expressed intention in his life. And this seems to be the rule in Ohio, where the charter contract and the rights of the parties originated. In the case of Supreme Council Benevolent Legion, etc. v. McGinness, 53 N. E. 54, 59 Ohio St. 531, the charter limited the beneficiaries to the family or dependents of the member. He subsequently changed it, making his wife and brother jointly beneficiaries. The court held that the brother was not a member of his family or a dependent, and that his designation was therefore invalid. It furthermore held that the original certificate remained in force. On this point the court said: "To attempt, therefore, to designate one who is

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neither of the family of the member, nor dependent upon him, being inconsistent with the charter and the laws, was wholly ineffectual to accomplish that purpose. Nor can we assume that the deceased member intended the procuring of the second certificate to operate as a revocation of the first in the event of its invalidity as respects his brother John. The certificate of February 3, 1894, being invalid, and the liability of council for the whole amount under the first certificate being admitted, it would follow that the original certificate should be regarded as in force." Lockett v. Lockett, 80 S. W. 1152, 26 Ky. Law Rep. 300; Leaf v. Leaf, 92 Ky. 168, 17 S. W. 354, 384, 13 Ky. Law Rep. 486.

We conclude that the charter of the insurance company obtained in 1894 was amended by the act of 1896, and that policy contracts entered into between it and its members after the latter act took effect must be conformed to that act. Therefore it was not competent for the insured to have designated his estate as the beneficiary of his policies, inasmuch as the statute did not allow such a beneficiary. The attempted change being void, the original designation, that of L. M. Sturges, the brother, remained unaffected by the void attempt.

The judgment of the circuit court was in conformity to the views herein expressed. Wherefore it is ordered to be affirmed on both appeals.

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CASE 14.—ACTION BETWEEN SYLVESTER NEWTON AND OTHERS AND J. C. OGDEN AND OTHERS INVOLVING THE VALIDITY OF A LOCAL OPTION ELECTION.—June 11.

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137 729
138 253

Newton, Etc., v. Ogden, Etc.

Appeal from Pulaski Circuit Court.

M. L. JARVIS, Circuit Judge.

From the judgment defendants appeal—Affirmed.

Intoxicating Liquors—Local Option Election—Time for Holding.—Under Ky. Stats., 1903, Sec. 2555, providing that local option elections shall not be held within thirty days, next preceding or following any regular political election, the day of the latter election is to be included.

THOMAS Z. MORROW, MORROW & MORROW and O. H. WADDLE for appellants.

AUTHORITIES CITED.

1. Is the statute mandatory: Cyclopedia of Law and Procedure, vol. 23, 39; Commonwealth v. King, 86 Ky., 456; Wilson v. Hines, 99 Ky., 221; Reynolds v. Commonwealth, 106 Ky., 37; Doores v. Varnon, 95 Ky., 507.

2. Computation of time: Batman v. McGowan, 1 Met., 548; Long v. Hughes, 1 Duv., 387; Board of Council, etc., v. Farmers' Bank, 20 Ky. Law Rep., 1635; Sapp v. Merrill, 8 Kans., 667; Richards v. Clark, 124 Mass., 491; Ward v. Walters, 63 Wis., 39.

3. Is the election a day or an act: Murphy v. Commonwealth, 85 Ky., 39; as to the effect of the omission "day" in sec. 2555; Const., sec. 61; Ky. Stats., secs. 1515, 1516, 1520, 1596; Sedgewick on Construction of Statutes, notes to pages 225-226.

4. Is Batman v. McGowan a dictum; and if so, its force: Black on Interpretation of Laws, 298.

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JAMES DENTON, WESLEY & BROWN, V. P. SMITH, SHARP, BETHURAM & COOPER for appellees.

The rule in regard to the computation of time, either under the common law or by statute, seems to be that when the computation is to be from the act done, the day on which the act is done must be included, but when the computation is to be from the day itself, and not from the act done, then the day on which the act is done must be excluded: Pollard v. Yoder, 2 A. K. M., 264; Geneva Cooperage Co. v. Brow, 30 Ky. Law Rep., 273; Childs v. Smith, 13 B. M., 460; Board v. Bank, 106 Ky., 811; Owen v. Howard, 87 Ky., 571; Commonwealth v. Shelton, 99 Ky., 120; Lebus v. The Wayne Co., 14 Ky. Law Rep., 794; Wilson v. I. C. R. R. Co., 29 Ky. Law Rep., 148.

This rule being well established, the query comes, does "such regular political election," found in Sec. 2555, Ky. Stats., mean an act or a day? And to properly answer the query, it is necessary to fully understand the true meaning of the word "election." It is defined by Webster to be "the act of choosing; the act of choosing a person to fill an office as by ballot, as the election of president or mayor."

ADDITIONAL AUTHORITIES.

Civil Code, sec. 681; Ky. Stats., sec. 453; 20 Ky. Law Rep., 1635; 9 B. Mon., 192; 4 Met., 53; 13 B. Mon., 460; 13 Ky. Law Rep., 973.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

In treating of the day on which local option elections shall be held, section 2555 of the Kentucky Statutes for 1903 provides that "they shall not be held on the same day with any regular political election, nor within thirty days next preceding or following any such regular political election." In the city of Somerset a local option election was held on the 6th day of December, 1906. The general election was held on November 6, 1906. The election was contested upon the sole ground that it was held

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within 30 days next following the regular election. If the day on which the regular election was held is to be included in the computation of time, the local option election was not held within 30 days. If the date of the regular election is excluded, it was within the prohibited time. So that the controversy depends on the question whether November 6th is to be included or excluded.

The manner of computing time, when it becomes a question as to whether it shall be computed from an act done or the day upon which it was done, is altogether a matter of construction, in the absence of a statute controlling it, and different rules have been adopted by courts of last resort; but in this State it has been settled by numerous adjudications that, when the computation is to be made from an act done, then the day on which it is done must be included; but if it is to be made after or from the day itself, the day must be excluded. Moar v. Covington Bank, 80 Ky. 305, 3 Ky. Law Rep. 674; Chiles v. Smith, 13 B. Mon. 461; Handley v. Cunningham, 12 Bush, 401; Wood v. Commonwealth, 11 Bush, 220; Board of Council v. Farmers' Banks, 49 S. W. 811, 105 Ky. 811, 20 Ky. Law Rep. 1635; Long v. Hughes, 1 Duv. 387; Geneva Cooperage Co. v. Brown, 98 S. W. 279, 30 Ky. Law Rep. 272, 124 Ky. 16. If the regular election in the meaning of the statute is to be considered as an act done, then the day upon which it was done must be included. On the contrary, if it is to be regarded as a day or date, and not an act, then it must be excluded. The word "election" signifies any choice, whether it be by an officer, by a vote of the people, or by a board having the power of appointment, or otherwise; and it applies to a choice in other matters than the selection of an officer, as

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where other questions are submitted to the vote of the people. 1 Words & Phrases; 10 American & English Encyclopedia of Law, p. 562; 15 Cyc. p. 279; Webster's Dictionary, tit. "Elections." Guided by this definition of the word "election," which is generally accepted and approved, we conclude that, as used in the statute under consideration, the word "election" means the act of holding an election. The fact that the regular election occupies the whole time between the hours of 6 in the morning and 4 in the afternoon does not militate against the deduction that it is an act, as the length of time required in the performance of an act is not material if it be one continuous thing. An election of an officer by a body as the council of a city, or the Legislature of the State, although it might not occupy more than five minutes, would be an election according to the accepted definition of the word, as much so as a political election at the polls that occupied the greater part of a day. An act might occupy a minute, as in the service of process, or an hour, as in entering a judgment, or six hours, as in making a sale. But nevertheless the thing done would be an act, and in computing the time the day upon which it was done must be included. It would not do to say that the time occupied in completing the act should have any weight in determining whether it was an act or not, as this would involve the matter in inextricable confusion and uncertainty. Holding an election is as much an act as making a motion for a new trial, or prououncing judgment upon a verdict, or issuing an execution, or prosecuting an appeal.

It will be observed that the election is not to be held within 30 days next preceding or following "any such regular political election." If the statute had

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read "nor within thirty days next preceding or following the date of any such regular political election," or "nor within thirty days next preceding or following any such regular political election day," then by its terms the day upon which the political election was held must be excluded, as such would be the manifest legislative intent. Thus, in Commonwealth v. Shelton, 99 Ky. 120, 18 Ky. Law Rep. 30, 35 S. W. 128, where it was contended that an election was held sooner than 60 days after the application for the election was lodged with the judge, the court, in holding that the day upon which the application was lodged must be included, said: "The act provides that the election shall not be held earlier than 60 days after the application is lodged with the judge. It does not say 60 days after the day on which the application is made, but says after the application is lodged. The time begins to run after the act of lodging the application, not after the day on which the application is lodged. Estimating the 60 days, the day on which the application for the election is made must be excluded." In Chiles v. Smith, 13 B. Mon. 460, in computing the time which would bar a writ of error to this court from a judgment, it was held that the day on which the judgment was rendered must be included; the court saying: "So in this case, the language of the statute being that no writ of error shall be sued out except in three years next after the judgment or final decree, the day upon which the decree was rendered must be included and regarded as the first day of the three years. If the language of the statute had been that no writ of error should be sued out except in three years next after the day on which the judgment or decree was rendered, then as the computation would have been

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from the day itself, and not from the act done, the day on which the decree was rendered would have been excluded." In Batman v. McGowan, 1 Metc. 533, the court, after approving the rule that, when the computation of time is to be made from an act done, the day on which it was done must be included —and this was the question before the court, for decision—by way of argument, said: "That part of the statute, however, which directs the sheriff to deposit the poll-books within two days next after the election evidently excluded the day of election, and the two next or following days are the days referred to. As the election occupies,oris supposed to occupy, the whole of the day on which it takes place, the expression 'within the two days next following the election' clearly means the two days next after the day of election, And, as both of these days are included in the time allowed in depositing the pollbooks, the last one of the two, as well as the day after the election, must be excluded in computing the intervening time, so as to leave two whole days. This, therefore, may be regarded as one of the exceptions to the general rule growing out of the peculiar language used and the manifest intention of the Legislature."

The court was evidently induced to adopt this construction in view of the necessity for allowing two full days in which the officers might deposit the pollbooks. In 1858, when this opinion was delivered, some of the counties of the State were large, the means of communication was difficult, and it would be attended with unnecessary inconvenience to require pollbooks to be carried from remote precincts to the county seat on the day following the election, and therefor in construing this statute to carry out the purpose of the Legislature, and allow the election

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officers a convenient time in which to perform their duties, they were given two full days; the statute being liberally construed to accomplish this purpose, and for the same reason it has been so construed ever since. Just as in motion for a new trial where only three days are allowed; and in cases of felony in which it is provided that judgment shall not be pronounced until two days after the verdict is rendered Sundays are excluded, upon the ground that it was the intention of the Legislature to allow three full days, although generally when the time is more than one week, intervening Sundays are counted. Long v. Hughes, 1 Duv. 387; O'Brien v. Commonwealth, 89 Ky. 354, 12 S. W. 471, 11 Ky. Law Rep. 534. But there is no reason or necessity for applying this rule of construction to a case like this. Nor are the views here expressed at all in conflict with the opinion in Commonwealth v. Murphy, 95 Ky. 38, 23 S. W. 655, 15 Ky. Law Rep. 411, 16 Ky. Law Rep. 224, holding it to be unlawful to sell liquor at any time during the 24 hours of election day under a statute prohibiting the sale of such liquors upon the day of any general or primary election. The statute expressly uses the word "day," and does not confine the prohibition to the hours during which the election is held, or to the act of holding the election. And it may be laid down as a settled rule in this State that when the statute does not expressly exclude the day upon which an act is done, however much time may be occupied in the performance of the act, the day upon which it takes place must be included in the computation of time, unless the time between two dates is so short as to make it necessary for the convenient conduct of the business that the day upon which the act was

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done must be excluded in order to allow the longest time possible.

The lower court having adjudged that the day upon which the regular November election was held must be included, its judgment is affirmed.

CASE 15.—ACTION BY THE COMMONWEALTH BY GEORGE H. ALEXANDER, REVENUE AGENT, AGAINST R. G. DUN & CO., TO COMPEL IT TO TAX CERTAIN OMITTED PROPERTY.—June 12.

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Commonwealth v. R. G. Dun & Co.

Appeal from Jefferson Circuit Court.

Common Pleas Branch (2 Div.) THOS. R. GORDON, Judge.

Judgment for defendant, plaintiff appeals—Reversed.

Taxation—Personal Property of Non-resident.—Where a non-resident establishes a business in the State and manages it by resident agents, money in bank and debts due it, accumulated from the business, are taxable under Ky. Stats., 1903, Sec. 4020, declaring all personal property situated in the State subject to taxation.

M. J. HOLT for appellant.

POINTS OF LAW AND AUTHORITIES.

1. Where business is conducted for an estate by four trustees, it constitutes a partnership, even though such trustees derive no profit personally: Story on Partnerships, 2d ed., secs. 70, 106.

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2. There are two classes of persons known to the law—natural and artificial. The only artificial person is a corporation. Partnerships and unincorporated persons are not persons, and the situs of their intangible property does not follow the person.

3. Appellee, R. G. Dun & Company, is a partnership, and the situs of partnership property, tangible or intangible, is wherever the partnership does business, although the members of the partnership may reside elsewhere. The firm and not the individual members are the owners of firm property. A firm for the purposes of taxation is a distinct entity: Louisville v. Tatum, Embry & Co., 111 Ky., 747; Pilcher's Succession (Civil Law), 39 La. Ann., 362.

4. A partnership can have nothing but a business situs, and that business situs is at every place the partnership does business. At such place its property must be listed, whether tangible or intangible.

5. R. G. Dun & Company is as much in business here as in New York. The relative amount of business done is not considered in fixing the situs. The defendant pays only on the Kentucky property.

6. Where money or credits is handled by an agent for a nonresident principal, loaned or re-loaned, checked on for current expenses, or is kept invested as a permanent business, and exclusively under the protection of the laws of this State, it acquires a business situs in this State, distinct from the domicil of a nonresident owner, and is subject to ad valorem taxes imposed by this State; Bristol v. Washington County, 177 U. S., 141-2-4; New Orleans v. Stempel, 175 U. S., 309.

7. Persons are not permitted to avail themselves for their own benefit of the laws of the State in the conduct of business within its limits and then to escape the due contribution of taxes to the public needs: New Orleans v. Stempel, 175 U. S., 309.

GREGORY & McHENRY for appellee.

LIST OF AUTHORITIES DISCUSSED ON BEHALF OF APPELLEES.

1. Bank deposits are intangible property: Williams v. Rogers, 14 Bush, 788; Clayson v. City of New Orleans, 14 S. W. R. 306; Grundy County v. Tennessee Iron & Coal Company, 29 S. W. R., 116; Commonwealth v. Cumberland Telephone & Telegraph Company, 99 S. W. R., 604.

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Commonwealth v. R. G. Dun & Co.

...unity of non-residents not taxable in Ken... Sec. 4020; Board of Councilmen of Frankfort v. ... Company, 23 Ky. Law Rep., 912; Callahan v. Singer ... Company, 92 S. W. R., 581; O'Callaghan's exor. v. ... 111 Ky., 765; Commonwealth v. Haggin, 99 ...

...s not in fact a partnership: Bouvier's Law Diction... ...artnership; Words and Phrases Judicially De... ... 5191; 2d ed. Amer. & Eng. Enc. of Law, vol. 22, ...

...n-resident, though partnership taxable same as indi... ...corporation; City of Louisville v. Tatum, Embry & ... 111 Ky., 747; Burroughs on Taxation, p. 225, sec. 98. ...ases discussed and distinguished: New Orleans v. Stempel, ... S., 309; Bristol v. Washington County, 177 U. S., 133.

OPINION OF THE COURT BY JUDGE NUNN—Reversing.

This action was brought in the Jefferson circuit court against R. G. Dun & Co., in the name of the Commonwealth of Kentucky, by Geo. H. Alexander, revenue agent for the State at large. There is no controversy as to the facts; the only testimony in the case being that of Mr. J. J. Sanders, the manager for appellee at Louisville, Ky., which shows that the business of R. G. Dun & Co. is conducted by four trustees, under the will of R. G. Dun, for the sole benefit of his estate, and that all the trustees and the chief office of the company are located in the State of New York. It is also shown, and is conceded, that appellee had established an agency and office in Louisville, Ky., many years ago, and had transacted a portion of its business there ever since, and that on September 15, 1900, had deposited in banks in that city to its credit $4,240.50; on September 15, 1901, $2,696.14; on September 15, 1902, $4,760.55; on September 15, 1903, $949.65; and on September 1, 1904, $161.14. There was due to the Louisville office

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from subscribers (or persons transacting business with appellee) on each of the above assessing dates about $5,000. The income from the Louisville office for each of the years named was about $40,000, which was deposited in the banks, on which the manager drew checks for all current expenses, and at the end of each month, if there was any substantial balance on deposit, he would remit to the New York office. It is conceded that the money deposited in the banks, and the amounts due at the assessing dates referred to, were omitted from assessment and taxation; but appellee claims that the situs of these deposits and the debts due appellee on the above-named assessing days, for the purpose of taxation, must be deemed and considered to exist in New York, the home of Dun's heirs, devisees, and trustees managing the estate. The lower court sustained this contention, and dismissed appellant' petition.

There can be no doubt but that this money in bank and debts due appellee, referred to, were personal estate. Section 4020 of the Kentucky Statutes of 1903 declares: "All real and personal property situated within this State, * * * shall be subject to taxation unless the same be exempt from taxation by the Constitution. * * *" This section of the statute literally includes all property, whether owned by residents or non-residents. This court, however, in construing this statute, has determined that it does not apply to the property of non-residents when in this State temporarily; that in such a case the situs for the purpose of taxation is at the domicile of the owner. See cases of Board of Councilmen v. Fidelity Trust & Safety Vault Co., 64 S. W. 470, 111 Ky. 667, 23 Ky. Law Rep. 908, Callahan, Sheriff, v. Singer Manufacturing Co., 92 S. W. 581, 29 Ky.

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Law Rep. 123, and Commonwealth, by Alexander, Revenue Agent, v. Haggin, 99 S. W. 906, 30 Ky. Law Rep. 788. But this court has never held that when a non-resident of this State establishes a business in this State, from which money is derived, and other property is accumulated, such property should be relieved from taxation. In our opinion the accumulations from the business of appellee are not temporarily in this State, in the meaning of the decisions referred to. In this case we have a non-resident with an established business, agents residing here who managed it, and an income of over $40,000 annually. Its business received the same protection as the business of the citizen under the laws of the State, and should be compelled to share equally the burden. The obligation to pay taxes on property for the support of the government arises from the fact that it is under the protection of the government. Persons should not be permitted to avail themselves of the benefit of the laws of the State in the conduct of their business, within its limits, and then escape their due contribution to the public needs. The case of Bristol v. Washington County, 177 U. S. 144, 20 Sup. Ct. 585,, 44 L. Ed. 701 is in point. In that case Justice Fuller said: "It was employed here as a business by one who exercised over it the same control and management as over his own property, except that he did it in the name of an absent principal. It was exclusively under the protection of the laws of this State. It had to rely on those laws for the force and validity of the contracts on the loans and the preservation and enforcement of the securities. The laws of New York never operated on it. If credits can ever have an actual situs other than the domicile of the owner, can ever be regarded as property within any other

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State, and as under obligation to contribute to its support in consideration of being under its protection, it must be so in this case. * * * In New Orleans v. Stempel, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174, certain taxes were levied on money on deposit, and also on money loaned on interest, credits, and bills receivable, and it was held by this court that the statute of Louisiana, as interpreted by the courts of that state, in authorizing such an assessment, did not violate the Constitution of the United States. There the money, notes, and evidences of credits were in fact in Louisiana, though their owners resided elsewhere. Still, under the circumstances of the case before us, we think, as we have said, that the mere sending of the notes to New York and the revocation of the power of attorney did not take these investments out of the rule. Persons are not permitted to avail themselves for their own benefit of the laws of a State in the conduct of business within its limits, and then to escape their due contribution to the public needs through actions of this sort, whether taken for convenience or by design."

For these reasons, the judgment of the lower court is reversed, and remanded for further proceedings consistent herewith.

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CASE 16.—ACTION BY H. M. STEGEMAN AGAINST LOUIS COOK CONTESTING AN ELECTION.—June 12.

Stegeman v. Cook

Appeal from Campbell Circuit Court.

A. S. BERRY, Circuit Judge.

Judgment for defendant, plaintiff appeals—Reversed.

1. Elections—Contests—Placing Questioned Ballots with Those Counted.—The fact that the election officers did not return any of the ballots as questioned, but put them all in the box as counted, was not material on a contest of the election.
2. Same—Effect of Lack of Objections to Ballots.—Where the election officers counted a ballot that should not have been counted, the fact that the validity of the ballot was not questioned before them does not prevent the defeated candidate from contesting it on a contest of the election.
3. Same—Ballots—Voting for More Candidates Than There are Offices.—Under the express provisions of Ky. Stats., 1903, Sec. 1471, if an elector mark more names than there are persons to be elected for the office, his ballot shall not be counted for the office.
4. Same—Contest—Trial—Settling a Tie Vote.—Where an election was contested and a tie was made apparent in the circuit court upon the contest, the court under the power to determine the case should have settled the tie by lot.

HARRY HEALLY and AUBREY BARBOUR for appellant.

PROPOSITIONS DISCUSSED AND AUTHORITIES CITED.

.1 A candidate showing a tie vote is entitled to contest his opponent's election: Wilson v. Tye, 29 Ky. Law Rep., 72; Imboden v. Cullen, 94 Ky., 45; Sheppherd v. Trustees, 24 Ky. Law Rep., 1072.

2. A ballot marked for more candidates for an office than

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there are officers to be elected, should be rejected: Ky. Stats., sec. 1471.

3. A ballot may be questioned, though not returned as "questioned," by the election officers: Strauss v. Johnson, 100 Ky., 319; Neely v. Rice, 29 Ky. Law Rep., 1142; Baily v. Hurst, 24 Ky. Law Rep., 504; Edwards v. Long, 24 Ky. Law Rep., 1105.

4. Contestant entitled to costs: Gimbell v. Green, 134 Ind., 628; Soto v. Vannery, 65 Cal., 285.

SAM E. ANDERSON for appellee.

There are two minor questions involved in this case, to-wit:

1. Is a candidate showing no better than a tie entitled to contest his opponent's election?

2. Who shall pay the costs of this contest? It is a well settled rule that excepting for ineligibility only the person showing himself entitled to the office can contest the election of the person adjudged entitled thereto by the returning board.

By showing no better than a tie Mr. Stegeman fails to come within the rule.

AUTHORITIES CITED.

Houston v. Steele, 98 Ky., 612; Edwards v. Long, 24 Ky Law Rep., 1106; Strauss v. Johnson, 100 Ky., 319; Banks v. Sargeant, 104 Ky., 699; Toney v. Harris, 85 Ky., 464; Howes v. Perry, 92 Ky., 262; Wilson v. Tye, 29 Ky. Law Rep., 72; Soto v. Vannoy, 65 Cal., 285; Neely v. Rice, 29 Ky. Law Rep., 1142:.

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

On November 6, 1906, there was an election in the district of Highlands in Campbell county of seven trustees. There were two tickets—one known as the "Open Book Ticket" and the other as the "People's Home Ticket." Louis Cook was on the former, and H. A. Stegeman on the latter. When the vote was counted, Cook received 240 votes by the official count and Stegeman 239. There were six other candidates who received a larger vote than either of them.

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Cook received the certificate and Stegeman contested the election. He alleged in his petition that there was one ballot cast at the election which was counted for Cook on which the voter had voted for eight persons for trustee, and that this ballot was void. He also charged that there were two votes counted for Cook which should not have been counted, for the reason that the stencil mark was not placed in the circle at the head of the ticket, but in a little square under the circle. The defendant by his answer charged that there were two ballots counted for Stegeman which were in like manner marked in the little square, and not in the circle. The court struck out of the petition so much of it as related to the two ballots which were stamped in the little square, apparently on the ground that the voter's intention was sufficiently evident from the ballot, a sample of which was filed with the petition. Proof was taken, and on final hearing the court opened the ballot box, and, finding the ballots properly preserved, recounted them. Upon his recount Cook received 235 votes and Stegeman 235. Thereupon the court entered a judgment dismissing Stegeman's petition, and he appeals.

The fact that the election officers did not return any of the ballots as questioned, and put them all in the box as counted, is not material. If the election officers count a ballot that should not be counted, the fact that the validity of the ballot was not questioned before them does not prevent the defeated candidate from contesting it on a contest of the election. By section 1471, Ky. St. 1903, if an elector mark more names than there are persons to be elected for the office, his ballot shall not be counted for the office. The ballot, therefore, which was marked for eight trustees was void, and could not be counted for any-

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body; for, independently of the statute, no one can tell from it which of the eight men were his preference, as only seven men were to be elected. If we disregard this ballot, there is a tie between Stegeman and Cook. But the circuit court concluded that as he had to open the box to see the ballot, as the ballot itself was the best evidence of its contents, it was proper that he should recount all the ballots, as there might be more than one ballot in this condition, and the result might not be affected. The court's recount, which gave to each of the men 235 votes, seems to us correct. So we have the same result whether all the ballots are recounted or not. It is insisted for appellee that the defeated candidate, who shows only that there is a tie vote, fails to show that he is entitled to the office, and that, therefore, Stegeman's petition was properly dismissed.

By subsection 5 of section 1596a, Ky. St. 1903, it is the duty of the county election commissioners to canvass the returns, and give certificates over their signatures of the number of votes given in the county, city, town, district, or precinct, as the case may be, and by subsection 12, where the board of canvassers find that two or more have received an equal number of votes for the same office, they shall by lot determine which of the candidates is elected. As neither Stegeman nor Cook received a greater number of votes than the other, neither is entitled to the office; but Stegeman has a legal right to have the tie determined as provided by the statute. When an election is contested, and a tie is made apparent in the circuit court upon the contest, the court, under the power to determine the case, should settle the tie vote by lot as provided by the statute. On the return of the case to the circuit court this will be done. The

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authorities in other states sustaining the ruling of the circuit court in dismissing Stegeman's petition are not applicable under our statute.

Judgment reversed and cause remanded to the circuit court, with directions to determine by lot who was elected, and enter a judgment for the person entitled thereto.

CASE 17.—ACTION BY VIOLA GROWBARGER AND OTHERS AGAINST THE UNITED STATES FIDELITY AND GUARANTY COMPANY AND OTHERS.—June 12.

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136 807

Growbarger, Etc., v. U. S. Fidelity and Guaranty Co., Etc.

Appeal from Ohio Circuit Court.

T. F. BIRKHEAD, Circuit Judge.

Judgment for defendants, plaintiffs appeal.—Reversed.

1. Municipal Corporations—Town Marshals—Liability on Bond—Acts Colore Officii.—Ky. Stats., 1903, Sec. 3690, requires a town marshal to execute a bond under which for any unlawful arrest or assault on any person in making an arrest, he and his sureties shall be liable to the person so injured. By Sec. 4 Ky. Stats, the widow of any person killed by the wanton or malicious use of fire-arms may have an action against the person doing the killing. Held, that where a marshal arrested a person for a misdemeanor, and then unnecessarily and maliciously killed the arrested person while under arrest, his widow might maintain an action on the bond.
2. Same Amount of Liability.—Ky. Stats., 1903, Sec. 3752, having provided that in an action on such a bond the recovery against the principal and surety shall not be limited to the

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penalty in the bond, the amount of plaintiffs' recovery was not limited to the penalty.

3. Same—Damages.—While plaintiff might recover punitive damages against the principal in the bond, only compensatory damages could be recovered of the surety.

4. Same—Pleading—Petition.—In an action on a marshal's bond, though the petition admitted that the authorities of the town had made no record showing an acceptance of the bond, it having alleged in substance that the bond was required of the marshal by the council, that it was duly executed, and that it was duly approved and accepted by the town council, and, in addition, an attested copy of the bond, obtained of the proper authorities of the town, having been filed with and made a part of the petition, as against a demurrer, there was a sufficient showing of acceptance.

W. H. BARNES and G. B. LIKENS for appellants.

POINTS AND AUTHORITIES CITED.

1. The widow is the proper party to maintain this action: Ky. Stats., secs. 4, 3690, 3751, 3752; McClure et al v. Alexander, 15 Ky. Law Rep., 732.

2. The defendant Surety Company is liable on its co-defendant's bond as marshal: Johnson v. Williams' admr., 23 Ky. Law Rep., 658; Connelly v. American Bonding & Trust Co. 24 Ky. Law Rep., 715.

3. The amount of the Surety Company's liability is not limited to the amount specified in the covenant: Moss et al. v. Rowlett et al., 112 Ky., 121.

H. P. TAYLOR and ERNEST WOODWARD for appellees.

Our contentions:

1. That the bond of the defendant, Stevens, as town marshal, upon which the action is based, was not accepted or approved by the board of trustees of the town of McHenry; in fact, there is no order approving same, and so much of the petition as alleges there were orders to that effect, was upon motion of plaintiffs stricken out.

2. If the court should hold that the bond sued on has been properly executed, received, approved and accepted by the board of trustees, and that the defendant company is liable thereon, we contend that it would not be liable for the malicious and wilful

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acts of the defendant, Stevens, but only for his official acts, and for the payment of any money that might come to his hands.

AUTHORITIES CITED.

Ky. Stats., sec. 3690; Commonwealth for use of, etc., v. Williamson, etc., 14 Bush, 297; Chamberlain & Tapp v. Brewer, etc., 3 Bush, 304; Carswell's exer., v. Renick & Wood, 7 J. J. Marshall, 281; Donahue v. Drexler, 82 Ky., 157.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

R. Flem Stevens, marshal of the town of McHenry, after arresting W. L. Growbarger, and while having him in custody, for a misdemeanor commited in his presence, shot and killed him. Thereafter this action was brought by appellant Viola Growbrager, widow of the deceased, and S. O. Fogle, administrator of his estate, against the marshal and appellee United States Fidelity & Guaranty Company, surety on his official bond, to recover of them $20,000 damages for the killing of deceased by the marshal, upon the alleged ground that it was not done by that officer in self-defense, but unnecessarily, wantonly, and maliciously. At the appearance term the appellee United States Fidelity & Guaranty Company insisted that the petition contained a misjoinder of plaintiffs and actions, and entered motion to correct same by requiring plaintiffs to elect. The court sustained the motion, but, plaintiffs refusing to make an election, the court made it for them by entering an order, striking the name of the administrator from the petition, and directing that the action be prosecuted in the name of the widow alone. Several amendments to the petition were filed, in one of which the Commonwealth of Kentucky was made a plaintiff,

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because the official bond of the marshal is in the nature of a covenant to the Commonwealth, as well as the town of McHenry. Stevens and appellee United States Fidelity & Guaranty Company filed demurrers to the petition, as amended, which were overruled. They then filed separate answers, after which the lower court reconsidered its ruling on the demurrers to the petition, and again overruled the demurrer of Stevens, but sustained that of appellee, and dismissed the action as to it. This appeal is from that judgment.

It seems to be conceded by counsel for appellee that the petition, as amended, states a good cause of action against Stevens as an individual, but denied that there can be any recovery against appellee as surety in his official bond, as marshal. The bond is as follows: "Commonwealth of Kentucky, County of Ohio. We, R. Flem Stevens, principal, and the United States Fidelity & Guaranty Company, of Baltimore, Md., surety, do hereby covenant to and with the town of McHenry, Kentucky, in the sum of one thousand ($1,000.00) dollars, lawful money of the United States, that the said R. Flem Stevens, marshal of the town of McHenry, Ky., shall well and truly discharge all the duties of said office and pay over to such persons, at such times as they may be respectively entitled to the same, all money that may come to his hands as marshal. Witness our hands, this the 4th day of January, 1904. R. Flem Stevens. The United States Fidelity & Guaranty Co., Thos S. Dugan, Gen. Agt. and Atty. in Fact."

The bond in question was executed pursuant to section 3690, Ky. St. 1903, which provides: "The marshal, before he enters upon the duties of his office, shall execute a bond with approved surety, to such

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town in the sum of one thousand dollars, conditioned for the faithful performance of his duties, and for any unlawful arrest, or unnecessary or cruel beating or assault on any person in making an arrest, he and his sureties shall be liable to the person so injured on said bond." Section 3751, which prescribes the form of the bond, reads as follows: "The obligation required by law for the discharge or performance of any public or fiducial office, trust or employment, shall be a covenant to the Commonwealth of Kentucky, from the person and his sureties that the principal shall faithfully discharge the duties of the office, trust or employment, but a bond or obligation taken in any other form shall be binding on the parties thereto according to its terms." Section 3752 allows the right of action on such official bond in the name of the Commonwealth for her benefit, or for that of any county, corporation, or person injured by a breach of its covenant or undertaking. Its language is as follows: "Actions may be brought from time to time on any such covenant or bond in the name of the Commonwealth, for her benefit, or for that of any county, corporation or person, injured by a breach of the covenant or condition, at the proper costs of the county suing, against the parties jointly or severally, together with the personal representative, heirs and devisees or distributees of such of them as may be dead; and the recovery against the principal and surety shall not be limited by the amount of the penalty named in such bond. Nor shall the recovery be restricted only to such duties or responsibilities as belong to the office, post, trust or employment at the date of the covenant or bond, but may include any duties or responsibilities thereafter imposed by law or lawfully assumed." Appel-

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lant rests her right to maintain the action upon section 4, Ky. St. 1903, which provides: "The widow and minor child, or either, or both of them, of a person killed by the careless, wanton or malicious use of fire arms, or by any weapon popularly known as Colts, brass knuckles or slung shots, or other deadly weapon, or sand bag, or any imitation or substitute therefor, not in self-defense, may have an action against the person who committed the killing, and all others aiding or promoting, or any one or more of them; and in such actions the jury may give vindictive damages."

It is contended by appellee that, as surety, its liability upon the marshal's bond cannot be extended beyond the precise terms of that instrument. Therefore it is bound for nothing which is not within the letter thereof. In other words, that its liability is limited to the official acts of the principal, and does not extend to an illegal act, done under color of office, of which he may be guilty, and that for this reason appellee is not responsible to appellant in damages for the homicide charged to the account of Stevens, if, as alleged in the petition, it was without justification or excuse. The following excerpts from section 283 of Mechem on Public Officers well states the rule as to the liability of a surety in an official bond for the acts of his principal: "It is an official act, a failure to perform an official duty, or performing it in an improper manner, which comes within the scope of the surety's undertaking. * * *" In further discussing the subject, the same author, in section 284, says: "Acts done by virtue and authority of the office (virtute officii) are clearly to be regarded as official acts, and render the sureties responsible; but acts done merely under color of the office

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(colore officii) do not stand upon so clear a ground. The distinction between the two has been stated thus: "Acts done virtute officii are where they are within the authority of the officer, but in doing them he exercises the authority improperly, or abuses the confidence which the law reposes in him. Whilst acts done colore officii are where they are of such a nature that his office gives him no authority to do them. For acts of the latter kind, it is held in many states that the sureties are not responsible. This question has been most frequently raised, and is well illustrated in cases in which it has been sought to hold liable the sureties of a sheriff, marshal, constable, or other executive officer, who has seized upon process against one person the goods or other property of another, or who has levied upon property which was exempt from such seizure. Upon the one hand, it is said that the officer acts officially, and hence binds his sureties, only when acting in pursuance and by virtue of his writ, and his writ justifies only the seizure of the property of the defendant therein named, not exempt from execution. His seizure of the goods of a stranger, or his seizure of exempt property, is a purely voluntary and unauthorized trespass, which neither his writ nor his official character can justify, and which imposes upon the officer merely personal, and not official, responsibility. On the other hand, it is said that the undertaking of the securities is that their principal will well and faithfully execute the duties of his office, and that he cannot be deemed to have done so when he seizes the property of a stranger, or levies upon property exempt from execution. There is, therefore, such a breach of the condition of the bond as renders the sureties liable. * * * *"

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The rule last stated prevails in quite a number of states, and is approved by numerous lawwriters. Thus, in Murfree on Sheriffs, section 60, the author, after quoting with approval from a Massachusetts case, which held a sheriff and his sureties liable for the wrongful act of a deputy of the former, performed merely under color of his office, makes the following statement of the law: "Sureties are not needed on a sheriff's bond, if they are only to be held when he acts legally. They vouch for his acts and bind themselves to make good any damage he may cause to any one while acting under color of his office. * * *" In Brown v. Weaver, 76 Miss. 7, 23 South 388, 42 L. R. A. 423, 71 Am. St. Rep. 512, it was held that a sheriff, whose deputy shot one charged with a misdemeanor while fleeing to escape arrest under a warrant therefor, was liable on his official bond in an action for damages brought by the person injured. But the most recent authority on the question under consideration is the case of Johnson v. Williams, Adm'r 111 Ky. 289, 23 Ky. Law Rep. 658, 63 S. W. 759, 54 L. R. A. 220, 98 Am. St. Rep. 416, the facts of which were very similar to those presented by the petition in the case at bar. The action was instituted by the administrator to recover on the bond of the sheriff damages for the wrongful shooting and killing of his decedent by two of that officer's deputies. The defense interposed was that no liability existed, because the decedent was killed by the deputies under the mistaken belief that he was a person charged with a felony, whose arrest they were seeking under a warrant, and that, as the decedent was trying to escape when the arrest was attempted, they had the right, or would have had such right as to the criminal, to prevent it by shoot-

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ing him; and, furthermore, that the act of the killing was not an official act for which the sheriff and sureties in his bond were responsible. But this defense was not deemed good, and it was held by this court that the sheriff was liable on his official bond for the wrongful act of his deputies in question, and that the lower court properly permitted a recovery. Shields v. Pflanz, 41 S. W. 267, 101 Ky. 407, 19 Ky. Law Rep. 648.

According to the averments of appellant's petition, her husband was unnecessarily and maliciously killed by Marshal Stevens, appellee's principal, when under arrest and in the custody of the latter. It matters not that the arrest was legal; if, as alleged, the decedent was not resisting or attacking the officer, and the latter was in no danger at his hands, the homicide was wholly inexcusable. Whether the facts alleged will be established by the evidence to the satisfaction of a jury cannot be known in advance of a trial, but our only concern at present is to determine whether, as set forth in the petition and confessed by the demurrer, they manifest a good cause of action. Accepting as true the version of the homicide contained in the petition, it must be regarded as having resulted either from the improper performance by the marshal of an official duty, or from an abuse of the confidence which the law reposed in him. In either event, the act was virtute officii. This being true, it is an act for which the officer and his surety may be held liable, for the undertaking of the surety, as expressed in the bond, is that the marshal "shall well and truly discharge all the duties of said office, * * *" and that, he cannot be deemed to have done, when in making an arrest he unjustifiably kills the person arrested. There is, therefore, such a

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breach of the condition of the bond as renders the surety liable. To so hold would not be such an enlargement of the covenant quoted as to do violence to the rights of the surety. The bond in character and terms substantially conforms to the requirements of section 3690, Ky. St. 1903. But, if this were not so, section 3751 provides that a bond taken in any other form than that specified "shall be binding on the parties according to its terms," and certainly the terms of this bond are broad enough to allow a recovery thereon for such a breach of the covenant in question as is alleged in the petition. Moreover, section 3690, after prescribing the terms of the bond required of a town marshal, declares that for any unlawful arrest, or unnecessary or cruel beating or assault on any person in making an arrest, he and his sureties shall be liable to the person injured on the bond. If the marshal and his sureties could not escape liability for a wrongful assault committed by the former in making an arrest, much less should they be permitted to do so for the unjustifiable killing by the officer of a person in attempting to arrest him, or while holding him in custody after the arrest.

It is further insisted for appellee that, even if responsible in damages for the killing of appellant's decedent, by the marshal, in no event can its liability exceed $1,000, the amount of the bond. We do not concur in this conclusion. The question is, we think, settled by section 3752 of the statute, supra, which allows actions on such a bond as that here sued on by appellant, and in addition contains the following provision: "And the recovery against the principal and surety shall not be limited by the amount of the penalty named in such bond." The bond, being controlled by the section supra, must be considered in

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connection with it. In other words, the provisions of the statute must be read into the bond in order to determine the extent to which appellee may be held liable, in the event appellant on the trial shows herself entitled to recover at all. Moss v. Rowlett, 112 Ky. 121, 65 S. W. 153, 358, 23 Ky. Law Rep. 1411. Treating the provisions of the section supra as a part of the bond, we conclude that the amount that may be recovered is not limited to the $1,000 named therein, but, while this is true if appellant shows herself entitled to recover, the jury cannot properly award her punitive damages as against appellee. Punitive damages may be recovered of the marshal, Stevens, but only compensatory damages can be recovered of the surety in his official bond. In Johnson v. Williams' Adm'r, supra, this court, in respect to the liability of the sureties of the sheriff, said: "The covenants of the bond do not require the sureties to do more than compensate an injured party for the actual damages which he may have sustained by reason of the misconduct of the sheriff or his deputies. Its covenants do not require them to pay a sum of money which is inflicted by way of punishment. They have committed no wrong, and therefore the reason of the law which allows exemplary damages against wrongdoers cannot make it apply to them. * * *"

It is further contended by counsel for appellee that the judgment of the lower court sustaining the demurrer and dismissing the petition as to appellee was authorized, because of the admission in the petition that the council or other authorities of the town of McHenry had neither made nor kept a record of the execution of the marshal's official bond, or of its acceptance by that body. It is true that the

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petition contains, in substance, the admission that the records of the council fail to show the execution or acceptance of the bond; but it also contains the averments, in substance, that the bond was required of the marshal by the council, that it was duly executed by him as principal and appellee as surety, and also that it was duly approved and accepted by the town council, and, in addition, an attested copy of the bond, obtained of the proper authorities of the town, was filed with and made a part of the petition. These averments, being confessed by the demurrer, constituted a sufficient statement of the facts showing the proper execution and acceptance of the bond. If no such bond was required of the marshal, or it was not executed by him, or signed by appellee as surety, or accepted at all, as alleged in the answer filed by appellee without waiving its demurrer to the petition, such matters of defense, or any of them, if sustained by sufficient evidence, on the trial, would prevent a recovery as to it, though the mere failure of the council to make the record of the execution or acceptance of the bond would not do so, if in fact it was executed and accepted. In executing an official bond, only a substantial compliance with the requirements of the statute is necessary. If statutes compelling the giving of bonds prescribe what they shall express, it is to subserve a two-fold purpose: (1) Uniformity in the terms and conditions; (2) the best protection possible from the bond to the public and those dealing with the officer. But as said in Mechem on Public Officers, section 268, such statutes are usually directory; "and, inasmuch as the substance is ordinarily more to be regarded than the form, it is quite generally held that, unless the statute expressly declares that a bond not executed in the form

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prescribed shall be void, the statute will be construed to be directory only, and a substantial compliance with it will suffice." In section 269, the author mentions various informalties which would not invalidate an official bond: "Thus, that the bond is not taken by the proper person or in the prescribed manner, or that it was not approved, or was not approved by the designated officer, or that it was not signed or acknowledged in the presence of a particular officer, or that it was given before the time specified, or not until the time fixed had expired, or was not stamped as required, or that the officer who gave it had not been sworn, is immaterial, and the bond, if otherwise perfect, will be enforced." Again, in section 270, it is said: "So the fact that the officers charged with the duty of approving of filing the bond had not performed it will not defeat the validity of the bond, or release the sureties from it." Also, in section 313, it is declared: "Approval being thus for the protection of the public only, it is well settled that where, by virtue of the bond, the officer has been inducted into the office, his sureties cannot escape liability for his defaults because the bond was not approved by the proper officer or was not approved at all."

Applying to the facts alleged in the petition the law as announced by Mechem in the several sections, supra, it is patent that the lower court erred in sustaining the demurrer to the petition upon the ground last indicated. Indeed, our consideration of all the questions raised by the demurrer to the petition has constrained us to disagree with the conclusions reached by the learned judge of the circuit court, for we are of opinion that the demurrer should have been overruled.

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Wherefore the judgment is reversed, and cause remanded for further proceedings consistent with the opinion.

CASE 18.—ACTION BY R. D. WELLS AGAINST THE TOWN OF MT. OLIVET, TO TEST THE VALIDITY OF AN ORDINANCE.—June 13.

Wells v. Town of Mt. Olivet

Appeal from Robertson Circuit Court.

L. P. FRYER, Circuit Judge.

Judgment for defendant, plaintiff appeals—Affirmed.

1. Municipal Corporations—Police Power—Regulating Hitching of Horses in Streets.—A town has a right, in the exercise of its police power, to pass an ordinance forbidding persons from leaving horses hitched or unhitched in the streets or alleys of the town.
2. Same—City Council—Place of Meeting—Failure to Designate by Ordinance.—Ky. Stats., 1903, Sec. 3696, provides that "all meetings shall be held within the corporate limits of the town at such place as may be designated by ordinance, and shall be public." Held that, where the trustees had not adopted an ordinance fixing a place of meeting, the members might assemble at some convenient and accessible place within the corporate limits of the town.
3. Same—Governmental Powers—Discretion as to Exercise.—Under the powers granted boards of trustees of towns of the sixth class by Ky. Stats, 1903, Sec. 3704, providing for the passage of ordinances, and police regulations, relating to the adoption of ordinances, and the courts will sustain them, unless it affirmatively appears that they are unreasonable or violative of the statutes or Constitution.
4. Same—Ordinances—Reasonableness.—Where an ordinance is

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not inherently defective as violating the Constitution or statutes, a person attacking it upon the ground that it is illegal, unfair, unreasonable, or oppressive must affirmatively show that as applied to him it is unreasonable, unfair, or oppressive.

ROBERT BRICKLER and JOHN P. McCARTNEY for appellant.

AUTHORITIES CITED.

McGraw v. town of Marion, 98 Ky., 674, 683; Ky. Stats., sec. 3704, subsecs. 1, 7; Dillon on Municipal Corporations, 3d ed. p. 115; Anderson v. City of Wellington 10 Am. State Rep., 178; ex parte Battle, 76 Am. State Rep., 709, 710-711; Vallo v. U. S. Express Co., 30 Am. State Rep., 742; Ky. Stats., sec. 3696.

HOLMES & ROSS for appellees.

AUTHORITIES CITED.

Finis Rowe v. J. A. Reneer and G. W. McCarthy, opinion filed Jan. 22, 1907; Ky. Stats., sec. 3704, subsecs. 1, 7; Gray, etc., v. Henry County, 19 Ky. Law Rep., 885; State of New Jersey, Trenton Horse R. Co. v. Inhabitants of the City of Trenton, 11 L. R. R., 410; ex parte Battis, 76 Am. State Rep., 709; Magenua and Brunner et al. v. City of Fremont, et al., 9 L. R. A., 786.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

This litigation involves the validity of the following ordinance: "An ordinance to prohibit the hitching of horses or the leaving of horses standing on the streets or alleys of the town of Mt. Olivet, Kentucky.—The board of trustees of the town of Mt. Olivet ordain as follows: That any person who shall hitch any horse or horses, or leave any horse or horses standing, on any of the streets or alleys in said town, shall be fined five dollars for each offense; provided, however, that any person may hitch any

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horse to the public hitching rack on the court-house square in said town." The appellant was fined and imprisoned for violating this ordinance by hitching his horse at a place in the town of Mt. Olivet other than the public hitching rack, and for the alleged illegal arrest and imprisonment sought to recover damages against the town.

The ordinance is assailed upon the ground that it is illegal, unreasonable, oppressive, and in violation of and beyond the powers vested in the trustees by the provisions of the Kentucky Statutes relating to towns of the sixth class; and because it was not enacted at a time or place or in the manner provided in the statute. The validity of that part of the ordinance prohibiting the leaving of any horse or horses standing on the streets or alleys of the town is not drawn in question; indeed, could it well be, as it is clearly competent for municipal authorities to forbid persons from leaving horses standing in the streets unhitched and unattended. This question was before this court in Rowe v. Reneer, 99 S. W. 250, 30 Ky. Law Rep. 545, and it was there held that such an ordinance was not unreasonable or oppressive, but, on the contrary, a salutary by-law, enacted for the purpose of protecting life and property from injury by runaway horses. And, in our opinion, the entire ordinance is a valid exercise of the police powers granted to the town by the statute governing towns of this class. Nor is there anything in the record to justify the conclusion that it is invalid because not enacted in the manner provided by law. Hence the action of the lower court in sustaining a general demurrer to the petition was proper.

It is avered in the petition that the ordinance "was not adopted as required by the laws governing towns

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of the sixth class; that no ordinance had at the time of the passage of this ordinance ever been adopted by the board of trustees of Mt. Olivet fixing the time and place of the meetings of the said board of trustees, so that the public should have notice of the meeting." Ky. St. 1903, section 3696, provides in part that "all meetings shall be held within the corporate limits of the town at such place as may be designated by ordinance and shall be public." Under this statute it has been held that, when the trustees have designated by ordinance the place at which meetings of the board shall be held, a meeting at another place, unless some good reason could be shown why it was not held at the regular place, would not be authorized under the statute, and the trustees at such meeting would have no power to enact ordinances for the government of the town. Shugars v. Hamilton, 122 Ky. 606, 92 S. W. 564, 29 Ky. Law Rep. 127; Town of Springfield v. People's Deposit Bank, 111 Ky. 105, 63 S. W. 271, 23 Ky. Law Rep. 519. But when the trustees have not adopted an ordinance fixing a place of meeting, the members may assemble at some convenient and accessible place within the corporate limits of the town. The mere fact that the trustees have not by ordinance provided a place of meeting will not in itself render invalid proceedings had in the usual way at a regular or called meeting, although a state of case might be presented that would warrant the court in holding that the legislation complained of was adopted at a place selected for the purpose of depriving the citizens of the town of the right to be present at meetings of the council. But we do not deem it necessary to further elaborate this point, as the only objection

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urged is that the trustees had failed to provide by ordinance a place for meetings of the board.

Under the charter of towns of the sixth class, the board of trustees are authorized, by section 3704 of the Kentucky Statutes of 1903, "to pass ordinances not in conflict with the Constitution or laws of this Commonwealth or of the United States," and "to do and perform any and all other acts and things necessary or proper to carry out the provisions of this chapter, and to enact and enforce within the limits of such town all other local, police, sanitary and other regulations as do not conflict with the general laws." In the exercise of the powers granted, the board of trustees are invested with a large discretion, relating to the adoption of ordinances that in their judgment are necessary for the peace, quiet, good order, and safety of the residents of the town. The presumption being indulged that they do not exceed the authority granted, and to this end within the powers delegated by the charter and when no provision of the Constitution or statutory law is violated, it is necessary that municipal authorities should be allowed a large latitude in the governmental affairs of the city or town controlled by them for the time being. Although all cities and towns of the State are divided into six classes, and one general law governs each class, it is a matter of common knowledge that the conditions in the numerous towns, especially those in the sixth class, are very different, and to meet this varying and dissimilar state of affairs it is essential that the trustees should be permitted to enact ordinances suitable to the convenience and necessities of the people. In many instances an ordinance adapted to the needs of one town would be wholly inadequate and inapplicable to the wants of

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another. For this reason, multitudes of ordinances dealing with the innumerable subjects of municipal government have been enacted; and the disposition of the courts is to sustain them unless it affirmatively appears that they are unequal, unfair, unreasonable, oppressive, or violative of the statute or Constitution. Hence, when an ordinance is assailed upon the ground that it is illegal, unfair, unreasonable, or oppressive, the person complaining will ordinarily be required to point out specifically in what respects the ordinance is unreasonable, unequal, or oppressive as applied to the facts of the case relied on by him. An ordinance general in its scope may be adjudged reasonable as applied to one state of facts, and unreasonable when applied to circumstances of a different character. In recognition of these general rules, it is necessary that the plaintiff shall make out a clear case to authorize the court to interfere with the police powers of a municipal corporation when exercised in the enactment of ordinances. McQuillin on Municipal Ordinances, sections 185, 186, 327. The reasons for this rule doubtless rest upon the theory that it is often difficult to decide as a general proposition whether an ordinance is or not reasonable or oppressive; and this question can only be determined by applying it to the facts of a particular case. Thus, in the ordinance under consideration, we doubt if any one would dispute the authority of the town to prohibit the hitching of horses to shade trees, pumps, in public grounds, or at other places that might be an annoyance and inconvenience to the citizens of the town or an injury to its property or that of the citizen. On the other hand, the owner of a horse might properly hitch him for a few minutes in front of his premises, or in an alley or some other place

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within the corporate limits that would not inflict any injury or annoyance upon his neighbors or the public generally. The petition does not disclose where or to what object appellant's horse was hitched. For aught that the petition discloses, it may have been to a shade tree, or a pump, or other object, where it would be manifestly improper to hitch horses, and reasonable to enact an ordinance prohibiting the hitching at such point or place. In the absence of an allegation pointing out the object or place at which the appellant's horse was hitched, the presumption will be indulged that it was some place or to some object that the municipal authorities had the right in the fair and reasonable performance of their duties to prohibit the hitching of horses.

Therefore we are unable to determine from the pleadings whether the ordinance was reasonable or oppressive or not, when applied to appellant in this particular case. When the aid of the court is invoked to declare a municipal ordinance void, it must clearly appear that it is inherently violative of the law or some of the well-settled principles that are generally recognized as limitations upon the power of municipalities in the enactment of ordinances, or, if the ordinance is not inherently defective as coming within these inhibitions, then the person attacking it must affirmatively show that as applied to him it is unreasonable, unfair, or oppressive. State Consolidated Traction Co. v. Elizabeth, 58 N. J. Law, 619, 34 Atl. 146, 32 L. R. A. 170.

The ordinance here assailed is not on its face invalid, and, as appellant has failed to point out in what respect it was unreasonable, unfair, or oppressive as to him, the judgment of the lower court must be affirmed.

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CASE 19.—CONDEMNATION PROCEEDINGS BY THE MADISONVILLE, HARTFORD & EASTERN R. R. CO. AGAINST R. T. ROSS.—June 13.

Madisonville H. & E. R. R. Co. v. Ross

Appeal from Ohio Circuit Court.

T. F. BIRKHEAD, Circuit Judge.

From a judgment of the circuit court on appeal from the county court the Railroad Company appeals —Reversed.

1. Eminent Domain—Compensation—Taking of Entire Tract.—The inconvenience resulting from the loss of a home and in moving is not a proper element of damage in a condemnation proceeding by a railroad company.
2. Same.—Under Ky. Stats., 1903, Sec. 839, relating to condemnation proceedings by railroad companies, providing that either party may appeal to the circuit court by executing bond as in other cases, and that upon payment to the owner of damages and costs a railroad company may take possession of the land, but, when an appeal is taken, it shall not be entitled to take possession until it shall have paid into court the damages assessed and all costs; payment of damages and costs into court is not an abandonment of an appeal from the decision of the circuit court.

J. S. GLENN for appellant.

R. E. L. SIMMERMAN of counsel.

POINTS AND AUTHORITIES.

1. The measure of appellee's damage was the market value of the property at the time of its appropriation, with the cost and expense of moving added: Covington Short Route Railway Co. v. Piel, 87 Ky., 267.

2. The opinion of witnesses as to the amount of damages,

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without stating facts upon which that opinion was founded, was incompetent and misleading: I.C. R. R. Co. v. Smith, 22 Ky. Law Rep., 1655; Newport News & Miss. Valley Co. v. Wilson, 16 Ky. Law Rep., 262; 16 Cyc., 49, 53:

3. It was the duty of the court to have determined the measure of damages and confined the evidence to this: I. C. R. R. Co. v. Smith, 22 Ky. Law Rep., 1655.

4. The court should have permitted the appellee to answer and state at what price he had listed the property for taxation for the two years next preceding the date of trial. This was competent both for the purpose of contradiction and for testing the witness' knowledge of value: K. & I. Bridge Co. v. Held, 16 Ky. Law Rep., 160; Covington & Cincinnati Street Ry. Co. v. McHugh, 25 Ky. Law Rep., 1112.

5. It was not proper for the court to permit appellee to prove the price at which a lot adjoining the lot sought to be condemned had sold for without showing that the situation of the lots were the same and that no other questions entered into the sale of the adjoining lot except the mere question of value: 17 Cyc., 110; Paducah v. Allen, 21 Ky. Law Rep., 701.

6. The instruction given by the court was misleading and did mislead the jury. It did not define any rule by which the jury was instructed to measure appellee's damage, nor did it fix a measure of damage for their guidance. The court should have told the jury that the measure of damage was the market value of the property increased by the cost and expense of moving: Covington Street Ry. Co. v. Piel, 87 Ky. 267.

7. The argument of counsel for appellee was very improper and of such a nature as to arouse the feeling and prejudice of the jury against the appellant, and should not have been permitted: I. C. R. R. Co. v. Jolly, 27 Ky. Law Rep., 118; L. H. & St. L. R. R. v. Morgan, 23 Ky. LawRep., 121; L. & N. R. R. Co. v. Hull, 24 Ky. Law Rep., 375.

8. The judgment should not have been an absolute judgment that appellee recover of appellant so much money, but should have been a judgment fixing appellee's damages at the sum fixed by the jury and his cost, leaving it optional with the appellant to pay the sum adjudged and take the property, or to abandon its purpose of taking the property and thereby not incur liability on the judgment: Manlon v. L. St. L. & T. R. R. Co., 80 Ky., 491; Cornwall v. L. & N. R. R. Co., 20 Ky. Law Rep., 373.

SWEENEY, ELLIS & SWEENEY for appellee.

Our contention is that in condemning a homestead for the use

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of a railroad company the measure of damages is not its market value, as in case of voluntary sale, but it is the value of the property to the person from whom it is taken: Covington Short Route Ry. Co. v. Piel, 87 Ky., 267; Arnold v. Covington Bridge Co., 1 Duvall, 372.

OPINION OF THE COURT BY JUDGE BARKER—Reversing.

The appellant, by appropriate procedure under the statute, sought to condemn the homestead of appellee for the purposes of its railroad. The property involved consisted of a half acre lot, with dwelling house and the usual outhouses, situated in the town of Hartford, Ky. The commissioners appointed to appraise the property for the purpose of condemnation valued it at $1,000. Upon a trial before a jury in the county court, upon the exceptions of the owner, a verdict was returned fixing the value as appriased by the commissioners. The owner appealed to the circuit court, and a trial there resulted in a verdict fixing the value of the property taken at $1,600. Of the judgment based upon this verdict the railroad is here on appeal.

As the whole of appellee's property was condemned, there were no questions of resulting damage or accrued benefits to a remainder. The only question involved was the actual value of the property taken. Upon the trial the court permitted the appellee, over the objection of appellant to testify in his own behalf and to introduce others to testify that the inconvenience to him in moving from his homestead and finding another home damaged him to the extent of from $300 to $400, and after the evidence was in the following instruction was given to the jury as the measure of damages: "The court instructs the jury

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that they should find for the defendant the value to him in money of the property sought to be taken in this action, and in fixing its value they should take into consideration the inconvenience and loss, if any proven, resulting to the defendant from being deprived of his home, and should state in their verdict the damages the defendant will sustain by reason of the taking of his premises by the plaintiff." Lewis, in his work on Eminent Domain (2d Ed., section 463), thus states the rule for the measureof damages when the entire tract is taken: "This case presents but little difficulty, and so far as we have observed, there is no difference in the authorities as to the proper measure of damages. A fair equivalent for any entire piece of property is its market value in money." In section 478 it is said: "In estimating the value of property taken for public use, it is the market value of the property which is to be considered. The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it." In 15 Cyc. p. 685, the rule is thus stated: "The measure of damages when the whole of any particular piece of property is taken for a public use under the power of eminent domain is the market value of it. Market value means the fair value, as between one who wants to purchase and one who wants to sell, not what could be obtained for it under peculiar circumstances when a greater than its fair price could be obtained, nor its speculative value, nor a value obtained from the necessity of another, but its present value at a sale which a prudent owner would make if he had the power of election as to the time and terms. * * *" Am. & Eng. Ency. of Law (2d Ed.) vol. 10, p. 1151,

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on the subject in hand, says: "In determining the compensation to be paid to the landowner for land taken under the power of eminent domain, there are many elements that must be considered. The principal rule, which is to be applied as far as possible, is that, whenever property is taken, the fair market value of the property at the time of the taking should be paid for it. The market value of land is usually declared to be, not what the land would bring at a forced sale, but what it would bring in the hands of a prudent seller, at liberty to fix the time and conditions of sale. What property would bring at a fair public sale, where one party wanted to sell and another wanted to buy, may be taken as a criterion of its market value."

In support of the competency of the evidence complained of, and the validity of the instruction by the court, above quoted, the appellee relies upon Covington Short Route Transfer Railway Co. v. Piel, 87 Ky. 267, 10 Ky. Law Rep. 146, 8 S. W. 449. In that case the property taken was the home and business place of the defendant. In the opinion the court uses language which seems to recognize the right to remuneration for the inconvenience resulting from the taking of the home; but this language is coupled always with the loss of the place of business, and it is not clear that in the opinion of the court the mere inconvenience resulting from the loss of the home, without the loss of the place of business. would have entitled the owner to remuneration. There is a marked difference between the loss of a place of business and the loss of a homestead. One may build up a substantial property right in the patronage flowing to a particular place, and the loss of this property right by the condemnation of the place may be defi-

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nitely ascertained; but the mere inconvenience arising from the loss of a home is too ideal and speculative to be ascertained by the verdict of a jury. There is no standard by which to measure such loss. Some men are sentimental about their homes, and would not part with them for any price. With others the change of homes is a mere matter of business, with no sentiment entering into the equation. One man may be easily satisfied with another home, and suffer little or no inconvenience of any sort. Another may be hard to please, and he will remain without a home, perhaps, for a long time. In short, the question of inconvenience for the loss of a homestead is entirely too speculative to be allowed to enter into a procedure like this. If the loss be merely the cost of moving from one place to another, that is made up to the owner by the use of the money which the corporation must pay over to him before he is required to move; and any other inconvenience of a more sentimental nature he is required to suffer for the public benefit. In so far as the case cited seems to recognize the right of a jury to award damages for the mere inconvenience resulting from the loss of a home in a condemnation proceeding such as this, it is overruled as being out of harmony with the great weight of authority. The conclusion we have reached on this subject is consistent with the measure of damages fixed by the statute (section 836, Ky. St. 1903), which is as follows: "It shall be the duty of said commissioners to view the land and material, and to award to the owner or owners the value of the land or material taken, which shall be stated separately. * * * *" This language does not include any loss by reason of inconvenience to the owner which does not enter into the market value of the property taken.

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Another ground for reversal urged by appellant is the misconduct of the attorney for appellee in his argument to the jury. The language used by counsel was very objectionable, and entirely unsupported by the evidence of the case; but, as we have concluded to reverse the judgment for the reasons given above, we do not deem it necessary to set forth the language, because upon another trial the offense will not be repeated.

Since the record has been lodged in this court, the appellees have entered a motion to dismiss the appeal, and filed affidavits in support thereof. It seems that after the appeal was taken the appellant paid into court the full amount of the judgment and costs and then took a writ of possession, under which the owner was ousted from his property and the appellant placed in possession. It is now urged as a ground for the dismissal of the appeal that the appellant, by its subsequent procedure, has abandoned the appeal. This position is untenable. Section 839, Ky. St. 1903, clearly recognizes the right of the railroad company, condemning land, to appeal from an adverse verdict, and yet, pending the appeal, take possession of the property, provided it pays into court for the benefit of the owner the amount of the verdict and costs. So much of the statute as applies to the question in hand is as follows: "Either party may appeal to the circuit court by executing bond as required in other cases, within thirty days, and the appeal shall be tried de novo, upon the confirmation of the report of the commissioners by the county court, or the assessment of damages by said court, as herein provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the

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judgment of the county court when the damages are assessed by said court, and all cost adjudged to the owner, the railroad company shall be entitled to take possession of said land and material, and to use and control the same for the purpose for which it was condemned as fully as if the title had been conveyed to it. But when an appeal shall be taken from the judgment of the county court by the company, it shall not be entitled to take possession of the land or material condemned until it shall have paid into court the damages assessed and all costs." As said before, the foregoing statute clearly recognizes the right of the railroad company, after a verdict in a condemnation proceeding, to pay the amount of the verdict into court, take possession of the land, and also to appeal. This right attends the whole procedure, and extends to the appeal from the circuit court to the Court of Appeals, as well as the appeal from the county court to the circuit court. The value of the statute would be very nearly destroyed if the railroad corporation could not take possession of the property, pending the appeal, by paying into court, or to the owner, the sum assessed as the value of the property. This construction is supported by Chicago, St. Louis & New Orleans Railroad Co. v. Sullivan, 24 Ky. Law Rep. 46, 80 S. W. 791, and Shirley v. Southern Railway in Kentucky, 26 Ky. Law Rep. 360, 81 S. W. 268.

The motion to dismiss the appeal is overruled, and the judgment reversed for proceedings consistent herewith.

NUNN, J., dissents.

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CASE 20.—AGREED CASE BETWEEN TOM BUTLER AND THE FISCAL COURT OF JEFFERSON COUNTY AND OTHERS AS TO THE PAYMENT OF THE EXPENSES OF A LOCAL OPTION ELECTION—June 14.

Butler v. Fiscal Court, Jefferson County

Appeal from Jefferson Circuit Court.

C. P. BRANCH, 1 Div. EMMET *FIELD*, Judge.

From the judgment Butler appeals.—Reversed.

1. Intoxicating Liquors — Local Option Election — Costs. — Ky. Stats., 1903, Sec. 1540, provides that the cost of all elections held in any county shall be paid by the county treasurer, except as otherwise provided by law. Sec. 2555, regulating local option elections, provides that on an order by the county clerk for an election it shall be the duty of the sheriff to have the order published in a newspaper, and to advertise the same by printed or written handbills, and that, if the proprietor of the newspaper refuses to publish the notice, the bills shall be sufficient. Sec. 2559 provides that the court shall not make the order until the persons signing the petition have deposited with the county judge an amount sufficient to pay for printing or posting advertisements as provided for, and the fees of the clerk making entries in the order book. Held, that the petitioners should be required to deposit a sum sufficient to pay, not only for the printing of the bills, but for the publication.
2. Same.—Where the publisher of a newspaper publishes a notice, though the county judge has not required a deposit sufficient to cover the publication and other expenses, the cost of publication cannot be recovered from the county or the petitioners.

KOHN, BAIRD, SLOSS & KOHN and R. L. GREENE for appellant.

The appellant and his associates, who were petitioners for a

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local option election, deposited money therefor, but the sum deposited did not include the expense of publishing the order in a newspaper. The sole question is as to the liability of the petitioners therefor.

We contend they are not liable

1. Because the county court, not having required a deposit to cover these expenses, the defendants are not liable.

2. The statute will not bear a construction which requires the petitioners for an election to pay any part of publishing the order.

3. The Constitution requires the election to be held as a governmental function, at the cost of the public.

AUTHORITIES CITED.

Ky. Stats., sec. 2554, 2555, 2559, 1540, 1596, 1437; Const., secs. 1, 147; Cyc., vol. 19, p. 23; U. S. v. Goldenburg, 168 U. S., 95; Sutherland Stat., Construction, 2d ed., secs. 366, 493; Bosley v. Mattingley, 14 B. M., 73; Robertson v. Robertson, 100 Ky., 700; Brace v. Shaw, 16 B. M., 81; Sneed v. Commonwealth, 6 Dana, 336; City of Owensboro v. Hickman, 90 Ky., 629.

R. W. BINGHAM and R. L. PAGE for appellees.

We contend:

1. The petitioners asked for the election; they got what they asked for, and their failure to deposit a sufficient sum to pay the costs of the election will not release them from liability.

2. The holding of a local option election is not for the benefit of the public, but is for the benefit of a few who want to suppress the sale of liquors in the locality.

3. The Constitution does not provide that the calling for an election shall be free and equal, but that the holding of an election shall be free and equal.

CITATIONS.

Ky. Stats., sec. 2555; Const., sec. 61; Bosley v. Mattingley, 14 B. M., 73; Throckmorton v. Commonwealth, 18 Ky. Law Rep., 130.

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

The following agreed case was filed in the Jeffer-

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son circuit court: "The plaintiffs, fiscal court of Jefferson county, and the defendant, Tom Butler, herewith submit this agreed case for the decision of the court without action, and state the question and the facts upon which it depends, and present herewith a submission thereof. They state that heretofore, to-wit, in the month of September, 1903, a local option election to take the sense of the legal voters of West Louisville precinct in Jefferson county, as to whether or not spirituous, vinous, or malt liquors should be sold therein, was duly and regularly called and held under and pursuant to the provisions of section 2554 et seq., Ky. St. 1903. They state that, under and pursuant to section 2555 of the Kentucky Statutes, the sheriff of Jefferson county published the order of the county court ordering said election in a daily paper published in Jefferson county, to-wit, the Louisville Times, for two weeks before the holding of the said election, and also advertised the same by printed handbills posted at five conspicuous places in said precinct for the same length of time. They state that the cost of publishing the said order in the said daily paper as aforesaid, for the said precinct and other precinct elections similarly held, amounted to more than $200. They state that the defendant herein represents himself and those similarly situated in the said precinct herein named and in other precincts at which similar elections were held at the same time, and that the defendant and those co-operating and acting with him in calling said election deposited with the county judge in money an amount sufficient to pay for printing and posting the advertisements aforesaid and the fees of the clerk making the entries in the order book, pursuant to section 2559, Ky. St. 1903, but that the defendant did not deposit a sufficient

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amount to pay the charges of the said Louisville Times for publishing in the said daily paper the order aforesaid, and the controversy herein between the plaintiffs and the defendant is whether or not the cost of publishing the said order in the daily paper under section 2555 must be paid by the person signing the petition for the calling of the election. The plaintiffs contend that the said cost of publishing the said order in the newspaper must be paid by the persons who signed the petition calling for the election. The defendant, and those associated with him who signed the petition calling the election, contend that they are not required under section 2559 of the Kentucky Statutes of 1903, or under any other provision of the law, to bear the burden of the said costs. They state that the said Louisville Times has charged the cost of said publishing against the county of Jefferson, and has presented its bill therefor, but that the plaintiffs have refused to pay the same because advised that the said costs should be paid by those who signed the petition calling the election and because, in no event, the same should be charged against the plaintiffs. Wherefore the parties, plaintiffs and defendants, submit this controversy as a test to have determined the question herein submitted, and pray the judgment of the court thereon." The court entered the following judgment, from which the appeal before us is prosecuted: "This action having been heard and submitted upon the agreed case filed, and the court, being sufficiently advised, delivered a written opinion on the wrapper of the case, which is made a part of the record herein, and in accordance therewith it is considered and adjudged that the cost of publishing in the Louisville Times, a newspaper, the order of the Jefferson county court in the agreed

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case referred to ordering an election to be held in the precinct of West Louisville to take the sense of the people therein, as to whether or not spirituous, vinous, or malt liquors shall be sold therein, is a joint and several debt and obligation of the defendant Tom Butler and his associates who signed the petition calling said election, and must be paid by them, and that the said cost is not a debt or obligation of, or chargeable to, the fiscal court of Jefferson county; and it is further considered and adjudged that the defendant Tom Butler pay the costs of this action, for which the plaintiffs may have execution, to all of which the defendant Tom Butler excepts, and from this judgment he prays, and is granted, an appeal to the Court of Appeals."

Section 1540, Ky. St. 1903, provides: "The cost of all elections held in any county shall be allowed by the fiscal court of such county, and paid by the county treasurer, except as otherwise provided by law." The statute regulating local option elections contains, among others, the following provisions:

"Section 2555. It shall be the duty of the county clerk to give to the sheriff of the county, or such officer as may be appointed to hold said election, a certified copy of the order of the county court as it appears on the order-book, within five days after said order is made; and it shall be the duty of said sheriff or other officer, to have said order published in some weekly or daily paper published in the county for at least two weeks before the election, and also to advertise the same by printed or written handbills posted at some conspicuous place in each precinct in the county, for the same length of time, when the election is held for the entire county, and when the election is ordered to be held only in a city, district, or pre-

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cinct of any county, then at five conspicuous places therein for the same length of time; and, in any case, if there is no weekly or daily newspaper published in the county, or the proprietor of such newspaper refuses to publish such notice, the printed or written handbills, posted as before provided, shall be sufficient notice. The sheriff, or other officer, shall have the advertisement and notices herein provided for posted as herein required within seven days after he receives the order of the county court. All elections provided for in this act shall be held by such officers as would be qualified to hold elections for county officers, and they shall be selected in the same way, and all elections provided for herein shall be held in accordance with the provisions of the general election laws of the State, except that they shall not be held on the same day with any regular political election, nor within thirty days next preceding or following any such regular political election."

"Section 2559. The county court shall not make the order for said election until the persons signing the petition have deposited with the county judge, in money, an amount sufficient to pay for printing or posting advertisements as provided for, and the fees of the clerk making entries in the order-book."

It will be observed that, by section 2555, it is the duty of the officer to have the order of the county court published in some weekly or daily paper for at least two weeks before the election, and also to advertise the same by printed or written handbills posted at five conspicuous places in the precinct for the same length of time. It will also be observed that by section 2559 the county court shall not make the order for the election until the persons signing the petition have deposited with the county judge in

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money an amount sufficient to pay for printing and posting advertisements as provided for and the fees of the clerk for making the entries in the order-book. It is insisted for appellant that the deposit required by section 2559 does not include the cost of the publication in the newspaper, as provided by section 2555, for the reason that in section 2559 the only words used are, "Printing or posting advertisements as provided for," and that nothing is there said about a publication in a newspaper. This seems to us a narrow construction of the statute. The words "as provided for" evidently refer to the provisions of section 2555. The publishing of the notice in the newspaper is a printing of the advertisements "as provided for." The evident purpose of section 2559 is that the petitioners shall deposit with the county judge a sum sufficient to pay the cost of calling the election, including the giving of notice of the election. When this has been done, then section 1540 applies, and the cost of holding the election must be allowed by the fiscal court of the county and paid by the county treasurer.

It is also insisted for appellant that the holding of the election is in behalf of the public, and that the expense must be borne by the public under section 61 of the Constitution, which requires the General Assembly to provide by law a means whereby the sense of the people of any county, city, town, district, or precinct may be taken as to whether spirituous, vinous, or malt liquors shall be sold therein. But this section of the Constitution leaves to the Legislature a large measure of discretion. To illustrate: The Legislature may say what per cent. of the voters must sign the petition necessary to be presented in the county court. It may provide how often elections may be

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held, and, to guard against a minority of the voters calling for an election for frivolous or improper reasons, it may properly provide that the petitioners shall pay the cost of the proceeding in the county court, including the giving of the notice of the election.

Lastly, it is insisted for appellant that, as the petitioners made the deposit required by section 2559, they are not liable for anything further, and that, if the deposit is exhausted, the county, under section 1540, must pay the deficiency. As we have said, the county must pay the expense of holding the election, but it was clearly contemplated by section 2559 that the county is not to pay for printing or posting the advertisements as provided for in section 2555 or the fees of the clerk for making the entries in the order-book. The rule is that a demand cannot be created against the public without authority of law. The fiscal court has no authority to allow any claim against the county except such as are authorized by law; and, as the statute by necessary implication does not make the charge for advertising the election a claim against the county, the fiscal court properly refused to allow the claim. It does not follow that the petitioners are liable for the amount. The clear meaning of section 2559 is that the county judge must not make the order calling the election until the necessary deposit is made with him. It follows from this that he must determine when the necessary deposit has been made and fix the amount to be deposited. When the petitioners have made the deposit as required by the county judge, they have done all that the law requires of them. If they are not willing to pay as large an amount as he fixes, they may abandon their proceeding; but, when he fixes an amount and they deposit

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with him that sum, there is nothing in the statute imposing upon them any further liability. It will be observed that by section 2555, if the proprietor of the newspaper refuses to publish the notice, the printed or written handbills posted as provided by the section shall be sufficient notice. If the deposit required by the county judge is not sufficient to cover the publisher's price for publishing the notice and the other expenses, he may refuse to print the notice in his paper. It is voluntary with him whether he will print the notice or not; but, if he prints it, there is nothing in the statute gving him a right to look for anything else for his printing than the deposit made with the county judge. It is not uncommon in statutes of this kind for the Legislature to fix the cost of publishing the notice. That is intended to be reached here by the requiring of the deposit sufficient to cover the cost of the court orders and the printing and posting of notices. The legal fees of the officers may be easily ascertained, and the meaning of the statute is that the other cost is not to exceed the balance of the deposit. In other words, the statute instead of fixing a scale of prices, as that would vary in different communities, leaves the county judge to fix this cost, and require a deposit to cover it. When he has done this, no greater amount can be demanded by the publisher, and no further liability rests on the petitioners.

Judgment reversed, and cause remanded for a judgment as above indicated.

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CASE 21.—ACTION BY HENRY BERGER AGAINST THE STANDARD OIL CO. FOR DAMAGES FOR PERSONAL INJURIES.—June 18.—

Berger v. Standard Oil Co

Appeal from Jefferson Circuit Court.

C. P. Branch 2 Div., THOS. R. GORDON, Judge.

Judgment for defendant, plaintiff appeals—Affirmed.

1. Sales—Warranties—Right of Action.—A warranty is a matter of contract, and strangers to the contract have no right of action upon it.
2. Negligence—Dangerous Substances—Liability of Manufacturer.—Where a manufacturer or seller of an article is negligent in its composition or sale, so that injury results not to the vendee, but to a stranger, the general rule is that the seller is not liable unless either the article is an imminently dangerous one, or the seller has knowledge of its defects, and that they are such as to endanger life or property of one who has no notice of the defects.
3. Same—Knowledge by Manufacturer of Defect.—An action against a manufacturer of an article which is so defective as to endanger life or property of one who has no notice of the defect by a person other than the vendee, is founded on deceit, and the scienter must be laid as to the deceit to support it.
4. Same—Precautions Against Injury.—In an action against a manufacturer of defective lubricating oil by another than the vendee thereof for injuries caused by its explosion, there could be no recovery if the injured person could, by the exervise of ordinary care, have learned of the defective quality of the oil so as to have prevented his injury from its use.
5. New Trial—Grounds—Newly Discovered Evidence.—That a witness who would testify to a fact germane to the issues was not discovered until after the trial is not ground for a new trial, when it appears that he, or others to prove the

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same fact, might with ordinary diligence have been discovered before the trial.

6. Trial—Argument of Counsel—Matters Immaterial to Issues.—In an action against the manufacturer of defective lubricating oil for an injury caused therefrom, it was not error for the court to exclude remarks of counsel in his argument as to what he had thought and done in regard to having the oil analyzed.

MATT O'DOHERTY and M. K. YONTZ for appellant.

1. In this action the appellant was entitled to recover the damages, resulting to him from the breach of the warranty, without regard to whether the appellee or agents knew or could have known by the exercise of ordinary care that the oil was unsafe when used as a lubricant. One who makes a warranty must at his peril know that it is true. The party to whom a warrant is made cannot be charged with negligence for having accepted or acted upon it, unless the defect and resulting danger be so obvious that no man of ordinary prudence would have accepted or acted upon it, and even against this qualification of the rule the very highest authority may be cited.

2. The newly discovered evidence, presented in the affidavit of Mr. Cook, entitled appellant to a new trial of his case.

3. The court erred in the manifest prejudice of the plaintiff's substantial rights by denying to his counsel in the closing argumen of the case to the jury the right to comment upon important and significant facts which had been established by the proof in the case.

4. The court's ruling in sustaining the objection of defendant's counsel to the statement and argument of plaintiff's counsel in the presence of the jury, and in admonishing the jury not to consider the same, had the further highly prejudicial tendency to impress the jury that plaintiff's counsel were endeavoring in his behalf to gain advantage before the jury by improper means, all to the serious prejudice of plaintiff's case.

AUTHORITIES CITED.

McClintock v. Emick, Stoner & Co., 87 Ky., 163-164; Waterberry v. Russell, 8 Baxter (Tenn.), 159; Fisher v. Crescent Insurance Co., 33 Fed. Rep., 544; A. & E. Enc. of Law., vol. 28, p. 786; Cooper v. Oscar Daniels Co., 29 Ky. Law Rep., 1174; Standard Oil Co. v. Wakefield's admr., 102 Va., 824; 66 L. R. A., 795-796-797;

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Lou. Gas Co. v. Gutekunst, 82 Ky., 432; Standard Oil Co. v. Tierney, 13 Ky. Law Rep., 629; 92 Ky., 367.

HUMPHREY & HUMPHREY, KOHN, BAIRD, SLOSS & KOHN for appellee.

We conclude as follows:

1. That the appellant had no cause of action arising out of contract.

2. That there was no warranty.

3. That a cause of action for deceit was not set forth in the petition nor established by the proof.

4. That without allegation and proof that the appellee sold, as safe, an oil which it knew to be dangerous, the appellee can not recover.

5. That the case was submitted to the jury on instructions which were more favorable to the appellant than the pleadings or proof authorized.

6. That there was no error committed at the trial to the prejudice of any substantial right of the appellant, and that the verdict of the jury and the judgment of the court, delivered after mature deliberation and a full and fair hearing, should not be disturbed.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

Appellee sold to appellant's employer a quantity of lubricating oil to be used on a stationary steam engine. Appellant was the engineer who operated the engine. A lubricator, which had a glass tube attachment, was in use upon the engine. The oil was transmitted through it by means of steam pressure to the inside of the cylinders of the engine. The glass tube exploded while in such use, and while appellant was using in it some of the oil which his employer had purchased of appellee. In the explosion a piece of the flying glass struck appellant in the eye, and destroyed its sight. He brought this suit against appellee to recover damages because of his injury. He charged in his petition that appellee was guilty

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representing and warranting
the owner of the plant where
that the oil was fit and suit-
lubricant on the engine, whereas it
dangerous, and by reason of its dan-
inable quality it caused the explosion
appellant. The petition also alleged
knew, or, by the use of ordinary care,
known of the dangerous and unsuitable
but that appellant did not know, and
known of it with ordinary care on his
trial court submitted the question of appel-
nce in the matter to the jury in an instruc-
will be particularly noticed further along.
nce was sharply conflicting as to the suit-
of the oil as a lubricant for such purposes
it was put, and as to whether it probably
the explosion. The jury's verdict was for
ndant.

The first error assigned on this appeal is in the
's refusal to submit to the jury the question of
ant's right to recover upon the warranty. A
warranty is always a matter of contract. For its
breach, damages may be recovered by any party to
the contract injured thereby, including any person
for whose benefit the contract was made. But
strangers to the contract have no right of action upon
it. There is lacking privity, mutuality, consideration,
and every other element essential to constitute the
contractual relation between the claimant and the per-
son sued. 2 Benjamin on Sales, section 1004; King
v. Creekmore, 77 S. W. 689, 117 Ky. 172, 25 Ky. Law
Rep. 1292; Simons v. Gregory, etc., 85 S. W. 751, 27
Ky. Law Rep 509; Bank v. Ward, 100 U. S. 195, 25
L. Ed. 621.

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When a manufacturer or a furnisher of an article is negligent in its composition, construction, or sale, so that injury results not to the vendee, but to a stranger, the general rule is that the seller is not liable unless either the article is an imminently dangerous one, or the seller has knowledge of its defects, and that they are such as to endanger life or property without notice or warning of the defects. Cooley on Torts (3d Ed.) 1486-1489. The liability in this case, if one existed at all, was under the second exception just stated. It is founded on deceit, and is a tort. The scienter must be laid as to the deceit to support it. Heindirk v. Louisville Elevator Co. 122 Ky. 675, 92 S. W. 608, 5 L. R. A. (N. S.) 1103, 29 Ky. Law Rep. 193. We are of opinion that the circuit court properly classified the action by the instruction given, and in resting the plaintiff's right to recover on the fact of knowledge of the defective and dangerous quality of the oil, or notice of such facts as that it ought to have known of them. The instruction is as follows: "If you believe from the evidence that the oil in the evidence referred to was dangerous and unsuitable for use as a lubricant, and if you further believe from the evidence that the defendant, by its agent, represented to plaintiff that said oil was safe and suitable for use as a lubricant, and if you further believe from the evidence that the dangerous quality of the oil, if it was dangerous, was known to defendant or to its agents, or could have been known to the defendant or its agents by the exercise of ordinary care, and was not known to the plaintiff (and could not have been known to him by the exercise of ordinary care), and if you further believe from the evidence that the plaintiff relied upon the representations as to the character of the oil so made to him, if they were made. and in

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reliance thereon used the oil on his engine, and if you further believe from the evidence that the said oil, because of its dangerous quality, if it had such, caused the oil gauge to explode, and that plaintiff was thereby injured, then the law is for the plaintiff and you should so find." Appellant complains of this instruction upon the ground that it prevents a recovery by him if he could have discovered the faulty condition of the oil by the exercise of ordinary care before the injury. He relies on the cases of Wilson v. Chess & Wymond Co., 117 Ky. 567, 25 Ky. Law Rep. 1655, 78 S. W. 453, and Pfisterer v. J. H. Peter & Co., 117 Ky. 501, 25 Ky. Law Rep. 1605, 79 S. W. 450, in which the doctrine of the Bogenschutz Case, 84 Ky. 330, 8 Ky. Law Rep. 376, 1 S. W. 578, has been materially modified in this particular. But the principle announced in the Bogenschutz Case has not been repudiated, except as it applies to master and servant. As the master is under a duty to supply the servant with reasonably safe appliances, tools and place of work, the latter may rely on the assumption that the master has taken care to acquaint himself with the conditions, and, in the absence of warning or of obvious defects, or of such facts as naturally and reasonably come under the servant's observation in the course of his work, to notify him of the defects, he need not look out for them. But as between strangers the rule is different. There is no duty from one to the other. At least, neither has any reason to assume that the other has taken precaution for the former's safety. While one ought not to knowingly put on the market a dangerously defective product, the user of it uses it at his own risk if he knows of its defects; or, if he by the exercise of ordinary care could have learned of them so as to prevent his injury from its

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use, he ought to have done so. A man ought to take some care to protect himself from injury. It should be such care as ordinarily prudent persons similarly situated usually exercise for their own safety. That does not mean he should first subject such an article as a lubricating oil to a chemical analysis or any other unusual test. But if by mere observation, or such simple precaution as a man of average caution only would have used under similar circumstances to acquaint himself with what he was about to use, if it is discoverable that the thing is dangerously defective, he is deemed to have done so, and to have used it with full knowledge. He cannot shut his eyes, and then claim that he was hurt by somebody else's fault, when, if he had kept his eyes open, the other party's fault would have been harmless to him.

There is a further distinction as to the duty of one who furnishes an appliance or product intrinsically dangerous to take care to protect the public from its dangers. Standard Oil Co. v. Tierney, 92 Ky. 367, 13 Ky. Law Rep. 626, 17 S. W. 1025, 14 L. R. A. 667, 36 Am. St. Rep. 595. But lubricating oil is not of that class of articles.

A new trial was asked because of newly discovered evidence. This evidence was of a character that it was necessarily germane to the only issue in the case, and was such that its existence must have occurred to the plaintiff in its preparation. That the witness who would testify as indicated in the affidavits was not earlier discovered is not a ground for a new trial, when it appears that he, or others to prove the same fact, might with ordinary diligence have been discovered before the trial. The evidence is that of an engineer as to the explosive quality of certain low-grade oils. It is expert testimony, and would likely

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have been furnished by any skilled mechanical engineer if applied to, and if the science admitted of it. To give new trials on the discovery of such evidence would encourage almost endless protraction of such trials.

A final objection is that the trial court erred in ruling on the argument of appellant's counsel to the jury. This is the occurrence as shown in the bill of exceptions: "In his closing argument for plaintiff to the jury, M. O'Doherty, of counsel, commented upon the fact that the defendant, the Standard Oil Company, had failed to have the oil or any part of the oil, or oil similar to that sold to the plaintiff, and complained of in his petition, analyzed by any chemist, and had further failed to bring before the jury any one who had ever used oil similar to that sold to the plaintiff's employer, and complained of in the petition, and proceeded to argue that the failure of the defendant company to have the oil analyzed by a competent chemist could not have been the result of mere oversight, and in this connection stated to the jury that when the plaintiff, Berger, first called upon him, M. O'Doherty, as counsel, and complained of the oil, the very first thing counsel did or thought of doing was to have a chemist analyze the oil." The court's ruling excluded the remarks as to what appellant said to his attorney, and as to what his attorney did. We think the ruling correct. While it was relevant to prove that appellee did not have the oil analyzed, or tested, and it was legitimate argument that its failure to produce witnesses or evidence that the oil had ever been used for the purposes for which it was sold to appellant's employer was a circumstance to show that it was not fit for such use, still what appellant said to his attorney, and what his attorney

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thought and did, were wholly immaterial on the issue being tried by the jury.

There appears to us no error in the record, and the judgment is affirmed.

CASE 22.—ACTIONS BY THE CITY OF COVINGTON AGAINST THE COVINGTON & CINCINNATI BRIDGE CO.; THE CITIZENS' TELEPHONE, AND THE UNION LIGHT, HEAT AND POWER CO., TO RECOVER A FRANCHISE TAX.—June 18.

City of Covington v. Cov. & Cin. Bridge Co.

Appeal from Kenton Circuit Court.

W. McD. SHAW, Circuit Judge.

Judgment for defendant in each action and plaintiff appeals—Affirmed.

Taxation—Assessment—Franchises—Corporation—Statutory Provisions—Repeal.—Act of 1898 (Ky. Stats., 1903, Sec.2984a), conferring on the city assessor of cities of the first and second classes authority to assess the franchises of corporations, was repealed by Acts 1906, p. 83, c. 22, entitled, "An act relating to revenue and taxation," the purpose of which, as indicated by its context and supported by its title, was to reduce into one all the previous acts bearing on the subject, and providing that all acts and parts of acts in conflict with this act are hereby repealed except certain named acts, and that all franchises except those exercised in cities of the first class are to be valued and assessed by the State board of valuation and assessment, and hence the assessor of a city of the second class has no power to assess for taxation the franchise of corporations.

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F. J. HANLON city solicitor for appellant.

1. We contend that the Act of 1898 as embraced in Sec. 2984a, Ky. Stats., has not been repealed by the Revenue Act of 1906, and that the city assessor has the power to assess the franchise of the appellee corporations.

AUTHORITIES CITED.

Session Acts of 1906, sec. 19, p. 248.

CONSTRUCTION OF THE STATUTES.

Amer. & Eng. Ency. of Law, 2d ed., vol. 26, pp. 720, 721, 722, 723, 726, 739, 740, 741.

KENTUCKY DECISIONS.

City of Covington v. Kenton County, etc., 26 Ky. Law Rep., 680, 681; City of Covington v. District of Highlands, 24 Ky. Law Rep., 435, 436; O'Mahoney v. Bullock, etc., 87 Ky. Law Rep., 781.

CONSTRUCTION OF REVENUE STATUTES BY THE SUPREME COURT OF THE UNITED STATES.

Movius v. Arthur, 95 U. S., 420; Victor et al. v. Arthur, 104 U. S., 632; United States v. Gear, 3 How., 120; Indexed Digest U. S. Supreme Court Rep., vol. 2, p. 1497; Murphy, assessor, v. City of Louisville, 24 Ky. Law Rep., 1574, 1575, 1577.

ACTS OF 1906.

Session Acts 1906, p. 248; Amer. & Eng. Ency. of Law, vol. 26, pp. 720-726.

ADDITIONAL AUTHORITIES CITED.

Petition should be dismissed because plaintiff (below) has made no tender of taxes justly due: Eng. & Amer. Ency. of Law, vol. 27, pp. 723, 724; Frazer, etc., v. Seibern, etc., 16 O. Stats., 625; 2d vol. Cooley, pp. 1414, 1425; Merrill v. Humphrey 24 Mich., 170; Thompson v. City of Lexington, 20 Ky. Law Rep., 459, 460; Bell's Trustee v. City of Lexington, etc., 27 Ky. Law Rep., 595, 596; Albuquerque National Bank v. Perea, 147 U. S., 89, 90; Cooley on

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Taxation, 1st ed., p. 538; 2d ed., pp. 763, 764; London v. City, 78 N. C., 109-114; Mayor v. Waring, 41 Ala., 139-150; High on Injunctions, 2d ed., vol. 1, sec. 497.

The doctrine stare decisis should be applied herein: Murphy v. City of Louisville, 24 Ky. Law Rep., 1575; Amer. & Eng. Ency. of Law, vol. 26, pp. 160, 161, 167.

ERNST, CASSATT & McDOUGALL for appellee.
THOS. H. PAYNTER of counsel.

SUMMARY.

1. The city assessor was without power to make the assessment: Murphy v. City of Louisville, 114 Ky., 762.

2. The assessment complained of was made upon an erroneous principle and included the value of securities of another and distinct company not owned by appellee, and was fraudulent and excessive: Henderson Bridge Co. v. Commonwealth, 99 Ky., 621; Hager v. The American Surety Co., 29 Ky. Law Rep., 782; 2d Cooley on Taxation, 1459; C., B. & Q. R. R. v. Cole et al., 75 Ill., 591.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

These three appeals involve the same common question, which is the power of the assessors of cities of the second class in this State to assess for taxation the taxable franchises of corporations. By the act of 1898 (section 2984a, Ky. St. 1903) the franchises of corporations were assessable for taxation by the city assessors of cities of the first, second, and third classes. In 1906 the Legislature revised and adopted a comprehensive system of taxation. By its provisions all franchises, except those exercised in cities of the first class, are to be valued and assessed by the board of valuation and assessment, composed of the Auditor of the State, the Treasurer, and Secretary of State. The title of the act of 1906 is: "An

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act relating to Revenue and Taxation." Acts 1906, p. 88, chapter 22. The act covers every phase of the subject, in all its details. Its purpose, as indicated by its context and supported by its title, was to reduce into one, all the previous acts bearing on the subject. The court will also take notice that this revision of the revenue laws of the State was the result of a most thorough investigation by a special committee raised at the previous session of the Legislature, and in response to representations coming from various commercial and municipal bodies and individual taxpayers. Of previous acts many features had been declared inoperative by the courts, for one reason or another, and the purpose of the legislation on certain features of the subject had failed because of certain informalities pointed out in the decisions of the courts, and shown in the experience of the tax gatherers. As taxes must, by requirement of the Constitution, be laid pursuant to general laws, and must be uniform and equal, the mode of valuation and assessment of taxable property should conform as near as the subjects will permit to a uniform system of procedure in finding its values. Not only does the act of 1906 (Acts 1906, p. 88, c. 22) purport to cover all the subjects embraced by the previous acts relating to revenue and taxation, but, to make the legislative purpose clearer, if possible, it expressly repeals all previous conflicting acts, saving two exceptions. It reads on this point: "All acts and parts of acts in conflict with this act are hereby repealed, except the act of 1904, approved March 24, 1904." (Relating to the taxation of rectified spirits.) And: "Nothing herein shall be construed to repeal or amend chapter thirty-three of the acts of 1904, approved March 18, 1904, entitled an act to amend the revenue laws of the cities

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of the first class so as to carry into effect the amendment of section 181 of the present Constitution." Thus we find the Legislature picking out the specific statutes on the subject in hand that were then in force that it desired to preserve from the operation of the revision. The act of 1898 was itself an exception to the general scheme of assessment for State taxation. It may be regarded as a legislative experiment. But upon further consideration of the whole subject in 1906, in which the entire system was worked over and revised, the experiment of the act of 1898 was abandoned as to all save first-class cities in favor of the one uniform system. That the Legislature saw proper to so provide is clear, although its purpose is made more manifest, we think, by a contemplation of what the result under the previous system must have been. The franchises of all corporations were taxed by the State, and, save in cities of the first, second, and third classes, were assessed by a central board of executive officers who possessed excellent opportunities and presumed qualifications for such work. Much desired uniformity and certainty as to values were thus attainable, except as to those corporations operating in the cities named. While in those cities presumably the same data were relied on by the local assessors in valuing corporate franchises, it was easily possible, and altogether likely, that varying results would be attained, as different men of different judgments acted upon the matter. The result was inharmonious, and consequently unsatisfactory. The one assessment of corporate franchises is the basis for its taxation by State, county, and municipal government. The assessment required by the act of 1906 is made to apply for all those purposes, except as to first class cities. As to that class, by virtue of the amendment

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to section 181 of the Constitution, an altogether different mode of taxation is contemplated. The value of local assessors is one tried in long experience in this State, and is in harmony with the spirit of local self-government prevailing in our system. But obviously some subjects can be more justly and practically handled by a central board of broader powers. This is conceded, especially as to the assessment of railroad properties. And the legislative and executive departments have also found it so as to nearly all the corporations having taxable franchises. It is not for the judiciary to say as to the wisdom of such provisions. They lie altogether in the other departments.

The opinion in Murphy v. City of Louisville, 114 Ky. 762, 24 Ky. Law Rep. 1574, 71 S. W. 934, is relied on by appellant as sustaining a view contrary to that reached in this opinion. But it does not. That case involved the construction of the general revenue law of 1902, which, because of the limitation contained in its title, and the absence of a purpose to interfere with the system in vogue in the cities named, was held not to embrace the act of 1898 in the repealing clause. The difference between the acts of 1902 and 1906 is, in our opinion, that one clearly shows a purpose to repeal expressly all other conflicting acts (save the two expressly reserved from its operation), while the former did not show such purpose.

The judgment of the circuit court in each of these cases was in conformity to the views expressed in this opinion, and is therefore affirmed.

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CASE 23.—PROCEEDING BY THE CITIZENS' BANK AND OTHERS TO ESTABLISH CLAIMS AGAINST THE BANK OF WADDY, IN THE HANDS OF A RECEIVER, AND OTHERS.—May 22.

Citizens Bank, Etc. v. Bank of Waddy, Etc.

Appeal from Shelby Circuit Court.

R. F. PEAKE, Circuit Judge.

From the judgment defendants appeal—Reversed.

1. Banks and Banking—Borrowing Money—Limitations—Notice.—One lending money to a bank limited by its articles of incorporation to the borrowing of money not in excess of a specified sum, without having reason to know that the limit has been exceeded by other loans made to it when added to the loan made, is not affected by the limitation in the articles.
2. Same—Cashier—Apparent Authority.—It is within the apparent scope of the authority of a cashier of a bank to pledge its notes to secure money borrowed by him for the bank in the regular course of business.
3. Same.—The lender of money to a bank through its cashier acted in good faith and in the course of business. There was nothing in the transaction to put him on notice that the cashier exceeded his authority or misapplied the funds of the bank, or that the bank authorities were not regularly constituted and doing their duty. The cashier delivered to the lender a spurious resolution, purporting to have been passed by the bank's board of directors, authorizing the loan and the pledging of the bank's notes as collateral. Held, that the transaction was binding on the bank.
4. Same.—The fact that a lender of money to a bank, through its cashier, held a majority of the bank's stock as collateral security for a loan to the cashier, did not apprise the lender that there were no directors or that the stockholders were taking no interest in the management of the bank, and the bank was liable for the amount of the loan.
5. Same.—A bank may restrict the authority of its cashier, and,

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when this is done, it is bound to those having notice, actual or constructive, of the restriction, to the extent of the cashier's actual authority.

6. Same.—The validity of transactions resulting in the making of a loan to a bank and receiving its notes as collateral security must be judged by what the lender knew when it lent the money in the first instance, and not by what it learned afterward and before it took a renewal note.

7. Bills and Notes—Bona Fide Holders.—A debtor of a bank gave a note for the amount of the debt. The cashier pledged the note as collateral security for a loan to the bank. When the note became due, the debtor gave a renewal note, and the cashier promised to return the original note. The cashier did not return it, but pledged the new note as collateral security for a loan to the bank by another party. Held, that the debtor was liable to both lenders, who must exhaust other collaterals before they could call on the debtor for more than the amount of the original note, with interest, and what he paid beyond the original note must be deemed a debt against the bank.

DODD & DODD for appellants.

POINTS AND AUTHORITIES.

1. The appellee, Weakley's, petition, as amended, expressly admits the validity of the debt of the Bank of Waddy to the Bank of Commerce for borrowed money and the pledge of collaterals to secure it, saying therein:

"That the Bank of Waddy is indebted to the Bank of Commerce in the sum of Three Thousand ($3,000.00) Dollars, and that the said Bank of Waddy has pledged some of its notes and bills to said Bank of Commerce to secure the payment of said loan."

2. The evidence very clearly, and without any conflict, shows the regularity and validity of the said debt and pledge, and the receipt and use of the Bank of Waddy, in the regular course of its business, of every dollar of the money so borrowed, and further, that the action of its cashier in thus borrowing from the Bank of Commerce was ratified and approved by the board of directors of the Bank of Waddy.

3. The judgment of the lower court, to the effect, that the Bank of Waddy had lawful authority to borrow this $3,000.00 from the Bank of Commerce, but "had no authority from the board

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of directors to pledge any property of the Bank of Waddy to secure the same," is erroneous, and contrary to the law of the case. Martin v. Webb., 110 U. S., 14; Armstrong v. Chemical National Bank, 83 Fed. Rep., 557; 27 C. C. A., 601; Davenport v. Stone, 104 Mich., 520; Ditty v. Dominion National Bank, 75 Fed. Rep., 770; 22 C. C. A., 376; Blanchard v. Commercial Bank, 75 Fed. Rep., 253! 21 C. C. A., 319; Peoples Bank v. National Bank, 101 U. S., 181; Bank v. Flanders, 161 Mass., 335; Thomas v. Bank, 40 Neb., 501; Auten v. U. S. National Bank, 174 U. S., 143; Aldrich v. Chemical National Bank, 176 U. S., 618; Wyman v. Wallace, 201 U. S., 243; U. S. National Bank v. First National Bank, 79 Fed. Rep., 296; 24 C. C. A., 597; First National Bank v. American National Bank, 173 Mo., 162; Deposit Bank v. Fleming, 19 Ky. Law Rep., 1947; German National Bank v. Grinstead, 21 Ky. Law Rep., 674; Citizens Savings Bank v. Walden, 21 Ky. Law Rep., 739; Grant County Deposit Bank v. Points, 22 Ky. Law Rep., 105; Chemical National Bank v. Armstrong, 28 L. R. A., 240; as well as the elementary and other authorities cited in the brief of our associate counsel, Messrs. Willis & Todd.

WILLIS & TODD for appellant.

In asking for a reversal we rely upon the following points:

1. The cashier of a bank is its chief executive officer and has the inherent power to borrow money in the regular course of the bank's business, and pledge the bank's property as surety therefor.

2. (a) A banking corporation which receives and uses money borrowed in the regular course of business for its benefit, cannot repudiate the act by which the money was obtained and still hold the money.

(b) No material part of a single indivisible and entire transaction can be rescinded, and at the same time another part upheld to the injury or prejudice of one of the parties thereto, where there is no charge of fraud or deception.

3. The holder of negotiable paper deposited as collateral security is a holder for value to the extent of his lien.

POINTS AND AUTHORITIES.

1. Power of the cashier: 2d vol., Amer. & Eng. Ency., 1st ed., p. 118; Cyc., vol. 5, pp. 570, 579; Thompson's Commentaries on the Law of Corporations, vol. 4, secs. 4740, 4748, 4760; Morse on Banks and Banking, 4th ed., vol. 1, secs. 152, 158, 160, 165; Dav-

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enport v. Stone, 104 Mich., 321; Western National Bank v. Armstrong, 152 U. S., 346; Chemical National Bank of Chicago v. City of Portage, 160 U. S., 653; Auten, receiver, v. U. S. National Bank of New York, 174 U. S., 148; Aldrich v. Chemical National Bank, 176 U. S., 618; Grant v. Deposit Bank v. Points, 22 Ky. Law Rep., 105; Citizens Savings Bank v. Walden, etc., 21 Ky. Law Rep., 739; Deposit Bank of Carlisle v. Fleming, 19 Ky. Lew Rep., 1947.

2. Estoppel: German National Bank v. Grinstead, etc., 21 Ky. Law Rep., 674; German National Bank v. Butchers' Hide & Tallow Co., 97 Ky., 34; Springfield, Maysville & Harrodsburg Turnpike Co. v. Harrodsburg, 11 Ky. Law Rep., 309; Thompson's Commentaries on the Law of Corporations, vol. 4, secs. 5258, 5308; Cyc., vol. 16, p. 787; Harrison Land & Mining Co. v. N. C. & St. L. Ry. Co., 25 Ky. Law Rep., part 1, p. 523.

3. Appellants holders of notes for value: Secs. 26, 27, 57: The Law of Negotiable Instruments. (Charles M. Lindsay's Annotated edition); Woolfolk v. Bank of America, 10 Bush, 504.

J. C. BECKHAM & SON and BEARD & MARSHALL for appellee.

1. Appellant banks could get no higher or better title to the collateral placed with them than that held by the Bank of Waddy, the pledgor.

2. The charter of the Bank of Waddy limited the amount of its indebtedness.

AUTHORITIES CITED.

Chemical National Bank of New York v. Kohner, 8 Daly N. Y., 530; Western National Bank v. Armstrong, 152 U. S., 473; American National Bank v. Warren Deposit Bank, 29 Ky. Law Rep., 195; First National Bank v. Kiefer Milling Co., 95 Ky., 97; Ky. Stats., sec. 579; Walden v. Citizens Bank, 19 Ky. Law Rep., 1393; Poor v. Robinson, 13 Bush, 290; Brannin v. Force, 12 B. M., 506; 152 U. S., 347; Morse on Banks and Banking, sec. 165(b).

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

In the year 1900 the Bank of Waddy was incorporated under the Kentucky Statutes; the capital stock being fixed at $15,000. It was provided by the articles of incorporation that the indebtedness of the bank,

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except to depositors, should not exceed one-half the amount of the capital stock. L. W. Ditto was elected president and T. B. Hancock cashier. They were also two of the directors of the bank. The latter part of the year 1903 some of the directors became dissatisfied with Hancock as cashier, and at this juncture Hancock bought the stock of all the directors; the stock being assigned to him in blank constituting a majority of the stock in the bank. From this time on there was no board of directors. Hancock ran the bank as cashier, and there was no stockholders' meeting and no action was taken by the minority stockholders. Hancock took the stock which he had gotten from the directors and hypothecated it with the First National Bank of Louisville for a loan of $4,000. He made some payments on the note afterwards, but there was a balance of $3,000 of this debt outstanding when the Bank of Waddy made an assignment in January, 1906. The First National Bank still held the shares of stock as collateral to the note. On September 15, 1905, while Hancock was running the Bank of Waddy as above stated, in the name of the Bank of Waddy he borrowed $4,000 of the Fifth National Bank of Cincinnati, hypothecating to secure the note a number of notes executed to the Bank of Waddy by persons who had borrowed money from it. This note to the Fifth National Bank was renewed on January 16th, just before the assignment. In the same way in July, 1905, he borrowed $3,000 of the Bank of Commerce of Louisville giving a note which was secured by a number of notes as collateral, and it was renewed from time to time until about the time the bank failed. In November, 1905, he borrowed in like manner from the First National Bank of Louisville $3,000, and hypothecated a number of notes

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executed to the Bank of Waddy. All of these three last loans were made in the name of the Bank of Waddy by Hancock as cashier, and the money was paid over to the Bank of Waddy by the banks lending the money. It was used by the Bank of Waddy. When the bank failed, it owed its depositors about $23,000 and the assets, outside of the notes which had been pledged to the three banks above referred to, were sufficient to pay only a small part of the indebtedness. In the suit brought to settle the accounts of the assignee the circuit court held that the three banks above referred to had claims against the Bank of Waddy for the amount of money which they had paid it, but it denied them a lien upon the collateral which they held and required them to turn over the collateral notes to the receiver. From this judgment they appeal.

The limit of indebtedness for borrowed money which the Bank of Waddy could contract was $7,500, and every person dealing with a corporation is charged with notice of its powers under its articles of incorporation. But a creditor whose own debt against the corporation does not exceed the limit, and who has no reason to know that the limit has been exceeded, is not affected by the fact that there are other debts of which he has no notice which, when added to his own, make an aggregate indebtedness greater than the corporation can legally incur. Bell & Coggeshall Company v. Kentucky Glass Works, 106 Ky. 7, 20 Ky. Law Rep. 1684, 21 Ky. Law Rep. 133, 50 S. W. 2, 1092, 51 S. W. 180; 3 Cyc. 472. The debt of each bank was less than the limit, and none of them knew, or had reason to know, of the debts of the others, or that the limit of indebtedness had been exceeded. The debts of the banks are there-

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fore not affected by this provision of the articles of incorporation.

The proof is unquestioned that the money borrowed was paid to the Bank of Waddy, and was used by the Bank of Waddy. The Bank of Waddy is therefore liable for the money, as it cannot be allowed to take the money and use it without accounting for it. It is insisted, however, that the cashier, Hancock, was without power to borrow money or hypothecate the notes of the Bank of Waddy for it, and that the lending banks, therefore, acquired no lien upon the collateral. Hancock, to deceive the banks, furnished two of them what purported to be authority from the board of directors to him to make the loans, but these papers turn out to be forgeries. There was in fact no board of directors and no entries were ever made on the directors' books after January, 1904, when Hancock bought the stock of the directors, and there was never an election of directors after this. The two banks required Hancock to furnish them these papers out of abundance of caution, and, as they were void, the question remains whether Hancock as cashier had apparent authority to do the acts referred to, for, if he acted within his apparent authority, the Bank of Waddy is bound by his action, although he did not have the express authority which he professed to have. The case is an unusual one, in this: that there were no directors of the bank and no president. The only officer it really had was the cashier. The stockholders allowed the bank to be run by Hancock as cashier. Under such circumstances he had all the authority, as to one having no notice of the facts, that a bank cashier may properly exercise. As he was admittedly cashier, and there were no limitations upon his authority, he could exercise those powers

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which are within the apparent scope of the authority of a bank cashier. The cashier is the agent of the bank. His acts, within his official sphere, are binding on the bank, and by the general current of the later authorities he may borrow money in the regular course of the bank's business and pledge its property for its payment. 5 Cyc. 579; 4 Thompson on Corporations, section 4748; 1 Morse on Banking, sections 158, 160; Davenport v. Stone, 53 Am. St. Rep. 467, 104 Mich. 521, 62 N. W. 722; Chemical National Bank v. City Bank, 160 U. S. 653, 16 Sup. Ct. 417, 40 L. Ed. 568; Auten v. U. S. National Bank, 174 U. S. 143, 19 Sup. Ct. 628, 43 L. Ed. 920; Aldrich v. Chemical National Bank, 176 U S. 118, 20 Sup. Ct. 498, 44 L. Ed. 611. It follows from these authorities that it was within the apparent scope of the cashier's authority to pledge the notes of the Bank of Waddy to secure the money borrowed by it. Such transactions between country banks and city banks are of common occurrence, and there was nothing in the circumstances known to the lending banks to put them on notice that there were any defects in the authority of Hancock as cashier. The resolution of the directors was required by two of the lending banks so as to apprise the directors of what the cashier was doing and the better to secure the payment of their money at maturity. The fact that Hancock delivered to them spurious resolutions which had not been passed by the board of directors did not put the lending banks in a worse position than they would have been without these papers, which were simply nullities. The lending banks stand just as they would have stood if they had lent the money to the Bank of Waddy through Hancock as cashier without requiring anything from the board of directors. The spurious-

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ness of the papers deprived the banks of the added security they expected to derive from the co-operation of the board of directors, but it had no other effect on the transaction. The lending banks are entitled to a lien on the collateral pledged to them for the payment of their loans. They acted in good faith, and in the usual course of business, and there was nothing in the transactions to put them on notice that Hancock as cashier was exceeding his authority or misapplying the funds of the bank, or that the bank authorities were not regularly constituted and doing their duty. The fact that the First National Bank of Louisville held a majority of the stock as collateral security for a loan to Hancock did not apprise it that there were no directors, or that the stockholders in the bank were taking no interest in its management. Everybody in this record treated Hancock as cashier of the bank and as possessing all the powers incidental to the position. The depositors instrusted their money to him. The stockholders treated him in the same way. Under such circumstances they who trusted most should lose rather than those who required security before parting with their money. A bank may restrict the authority of its cashier, and, when this is done, it will be only bound to those having notice, actual or constructive, of the restriction, to the extent of his actual authority. But here there was no restriction upon the authority of the cashier. Obviously a bank cashier has authority, when he finds his cash running low at the close of a day's business, to borrow cash from another bank upon collateral to make ends meet; and, if he foresees that he may get in this condition, he may make such a loan in advance. It is said here that, when the notes were renewed from time to time, the lend-

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ing banks had notice that something unusual was going on. But the transactions are to be judged by what the banks each knew when it lent the money and not by what it learned afterwards when it was too late to help matters.

E. J. Paxton executed to the Bank of Waddy a note on April 5, 1905, for $2,000. Hancock as cashier pledged this note to the Bank of Commerce as collateral security for the money above referred to borrowed from it. When Paxton's note fell due in September, Hancock called upon Paxton to renew it. This Paxton did, and Hancock said to him that he would get the old note in a few days and deliver it to him. Instead of doing this, however, Hancock pledged this note to the Fifth National Bank of Cincinnati to secure the loan made by it. The question now presented is whether Paxton is bound to both the banks as innocent holders of the paper. In Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37, 29 Ky. Law Rep. 1232, it was held that the holder of a note to whom it is assigned as collateral security is a holder for value, although his debt had been previously created. Neither of the banks had notice of any infirmity in the note which it took. Under the present statute Paxton is therefore liable to each bank, but each bank should be required to exhaust first its other collateral before he is required to pay to both of them anything more than $2,000 and interest in the aggregate. He owes $2,000, and whatever he has to pay beyond $2,000 and interest will be a debt against the Bank of Waddy whose debt he will to this extent pay off. If either of the banks to which his notes are assigned can collect its debt out of its other collateral, it should be required to do so as to protect him from having to pay twice.

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Judgment reversed, and cause remanded for a judgment and further proceedings as herein indicated.

CASE 24.—ACTION BY JOHN M. SAULSBERRY AGAINST THE CHESAPEAKE & OHIO RY. CO. FOR DAMAGES FOR DELAY IN SHIPPING CORN.—June 18.

Chesapeake & Ohio Ry. Co. v. Saulsbury

Appeal from Carter Circuit Court.

S. G. KINNER, Circuit Judge.

Judgment for plaintiff, defendant appeals — Affirmed.

1. Carriers—Carriage of Goods—Delay in Transportation.—A delay of a month in the transportation of freight a distance of thirty-three miles is unreasonable, and the carrier is liable for the damages sustained.
2. Same—Remedy of Shipper—Right to Refuse Goods.—A shipper is not justified because of unreasonable delay in the transportation of his goods to refuse to receive them from the carrier.
3. Same—Right of Carrier.—Where a shipper refuses to receive the goods transported because of delay in the transportation, and the refusal of the carrier to make any concession on account thereof, the carrier has no right to convert the freight to its own use or to dispose of it contrary to law.
4. Under Ky. Stats., 1903, Sec. 785, authorizing a carrier having unclaimed freight not perishable in its possession for one year to sell the same at public auction, on giving notice to the consignor and consignee, etc., and to sell perishable freight as soon as it deems a sale necessary, on giving similar notice thereof, and to retain out of the proceeds the expenses of transportation, storage, advertisements, sale, etc., a carrier having in its possession as unclaimed freight corn delivered to it for transportation must, as soon as it is deemed neces-

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sary to sell the same, sell it as perishable freight, and give notice thereof, and may, if necessary to sell it at some other place for want of market, transport the same to such place, but the sale must be made in the State, and the carrier taking the freight to another State and there selling it converts it.

E. R. WILHOIT and JOHN T. SHELBY for appellants.

THEOBALD & THEOBALD for appellee.

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

On August 19, 1903, J. M. Saulsberry bought a car load of corn at Marion, Indiana, which was shipped to him at Aden, Kentucky. The first carrier brought the car load of corn to Ashland, and there delivered it to the connecting carrier, the Chesapeake & Ohio Railway Company, about September 1st. Ashland is 33 miles from Aden, but the corn was not brought to Aden until October 2d. In the meantime Saulsberry had made other arrangements for corn at Aden, and had no use for it there, but agreed to take it if the company would deliver it at E. K. Junction, which was eight miles from Aden, and between Aden and Ashland. The company refused to do this. It also refused to make any deduction from the freight on account of the delay in getting the corn to Aden. Saulsberry then declined to pay the freight and take the corn. The corn lay on the side track at Aden until about December 20th, wheu the company notified Saulsberry that it would sell the corn for its charges. On January 8th the railroad company shipped the corn to Cincinnati, and there sold it for $240, from which it deducted its freight and charges, $127.15, leaving $112.85, which it tendered to Sauls-

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berry. He refused to accept the money, and brought this suit against the railroad company for the conversion of the corn. The jury to whom the case was submitted found a verdict for him for the value of the corn, less the amount of the freight charges. The court entered judgment upon the verdict, and the defendant appeals.

The amount of the verdict is not assailed, but it is insisted that the plaintiff was not entitled to recover. The long delay in getting the car load of corn from Ashland to Aden is accounted for by the defendant by the fact that its yards at Ashland were congested, and that it could not sooner move the car out. Manifestly the delay was unreasonable, and the railroad company was liable to Saulsberry for damages, but this did not give him the right to refuse to receive the corn and throw it upon the hands of the railroad company. But, when he did refuse to receive the corn, the railroad company, after its refusal to make any concession to Saulsberry on account of the delay, had no right to convert the corn to its own use or to dispose of it contrary to law. It had a lien on the corn for its freight charges. The rule as to this lien is thus stated in Hutchinson on Carriers: "At common law and without some statutory authority, the carrier, as has been seen, cannot sell the goods for his charges upon them. The lien confers no such right. It consists merely in the right to keep or detain the goods; and, if the consignee or owner refuse to pay for the carriage and take them, the remedy of the carrier is to have them sold under a judicial order or legal process, to be obtained by a proceeding in equity. A sale without some such authority would be a conversion by the carrier, and he would thereby become liable to whatever damage the owner might sustain by the

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illegal act, and the purchaser would acquire no title. Where there is a statute authorizing the sale, the sale must be fairly conducted, and held at the time and upon the notice provided by the statute." Hutchinson on Carriers, section 494.

The only statute in this State regulating the subject is section 785, Ky. St. 1903: "Every company that shall have unclaimed freight, not perishable, or unclaimed baggage in its possession, for one year or more, may sell the same at public auction, and out of the proceeds thereof retain the expenses of transportation, storage, advertisement, and sale. Notice of such sale shall be given to the consignor and consignee by letter addressed to each of them, respectively, and mailed to the nearest post-office to the place at which the goods were received, and to which they were carried; and notice of such sale shall also be published for four weeks in some newspaper of general circulation in the State. In case the freight is perishable, it may be sold as soon as it is deemed necessary and proper, and notice of such sale shall be given, if practicable, to the consignor and consignee, as herein directed. A record shall be kept of the articles sold, and the prices obtained therefor, and the surplus, if any, after payment of charges, shall be paid to the owner of such articles, if demanded, at any time within two years from date of sale." When Saulsberry declined to receive the corn, it became unclaimed freight, and we think a car load of corn is perishable freight within the meaning of the statute. It was therefore incumbent upon the railroad company, as soon as it was deemed necessary and proper, to make a sale and give notice both to the consignor and consignee, and, as this was practicable, also to publish the notice of the sale for four weeks in some

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newspaper of general circulation in the State. What the statute evidently contemplates ordinarily is a sale at the place where the freight is. But, if it is necessary to sell it at some other place for want of a market or other reason, still the sale must be made in this State and after notice, as provided in the statute. The statute has no operation outside of the State, and a sale made out of the State or without notice as provided by the statute is void. The act of the company in taking the car load of corn to Cincinnati and there selling it operated as a conversion of the corn. On the whole case we see no error to the prejudice of the substantial rights of appellant.

Judgment affirmed.

CASE 25.—PROSECUTION AGAINST FRANK DREWRY FOR VIOLATING THE ELECTION LAWS.—June 19.

Commonwealth v. Drewry

Appeal from Jefferson Circuit Court.

Criminal Division—JOSEPH PRYOR, Judge.

From a judgment sustaining a demurrer to the indictment the Commonwealth appeals—Reversed.

1. Indictment—Formal Requisites—Caption—Omission—Effect.—Under Cr. Code Prac., Secs. 122-124, providing that an indictment must contain the title of the prosecution, the name of the court in which the indictment is presented, and the names of the parties, and must be direct and certain as regards the offense charged and the county in which the same was committed, and giving the form of the caption of an indictment showing the names of the parties and the court, an

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indictment containing in its body the averments that it was found by the grand jury of a county named, and that in the name of the Commonwealth it charged the accused with the commission of the crime described, and showing that it was committed within the county, was good, though the caption was omitted.

2. Same—Accusatory Part—Allegations—Sufficiency.—An indictment charging a violation of Ky. Stats., 1903, Sec. 1585a, punishing an officer of an election who shall "knowingly and wilfully" certify to an improper certificate of the election, which alleges in its accusatory part that accused "unlawfully and feloniously" certified to an improper certificate of election, is not bad, where in its body the statutory words are used.

3. Elections—Violation of Election Laws—Indictment.—An indictment charging a violation of Ky. Stats., 1903, Sec. 1585a, punishing an officer of an election who shall knowingly and wilfully certify to an improper certificate of the election, which alleges that an election was held under the laws of the State, and that officers of election were appointed under and in accordance with the laws to serve as such in a designated precinct, and that accused was duly appointed to serve as clerk of election in the precinct, sufficiently states his connection as an officer with the election, without setting out when or by whom he was appointed.

4. Same.—An indictment charging a violation of Ky. Stats., 1903, Sec. 1585a, punishing an officer of an election who shall knowingly and wilfully certify to an improper certificate of the election, which alleges the appointment of accused as clerk of an election held under the laws of the State, and that he wilfully and knowingly certified that a certain number of votes were cast at the election, when he knew that they had not been cast, sufficiently states an offense under the statute.

5. Indictment—Requisites—Statutory and Common-Law Offenses.—Under Cr. Code Prac., Secs. 122-124, providing that an indictment shall contain a statement of the acts constituting the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is intended, and declaring that an indictment must be direct and certain as regards the party and offense charged and the county in which the offense was committed, an indictment charging a statutory offense must use the words of the statute or words having the same meaning, and an indictment charging a common-law offense must follow the forms of the common law.

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6. Elections—Violations of Election Laws—Prosecutions—Indictment—Statutes.—Ky. Stats., 1903, Sec. 1591, declaring that the chapter relating to elections shall be liberally construed, so as to prevent any evasion of its prohibitions and penalties by shifts or device, though enacted to prevent persons charged with offenses against the election laws from escaping punishment on technicalities and irregularities, does not abrogate the code provisions relating to the elements necessary to constitute a good indictment; but it should be read in connection with them, as illustrating the legislative intent concerning offenses against the election laws.

LOUIS B. WEHLE for appellant.

N. B. Hays, ATTORNEY GENERAL CHAS. H. MORRIS and J. M. HUFFAKER of counsel.

POINTS AND AUTHORITIES IN BRIEF FOR APPELLANT.

In an indictment for false swearing—

1. Where the alleged offense has been committed in course of a judicial proceeding which was pending, and which, by reason of its nature, according to the public statutes, could have only been pending properly in the court in which the indictment was found, and where the court in question has a division distinct in name from that of any division of any other circuit court in the State, if the style of the judicial proceeding is distinctly set out, together with its exact nature, with an averment that it was pending in the division having the distinctive name, the court, in which the judicial proceeding was pending, is sufficiently set out: Commonwealth v. Still, 83 Ky., 275; Cope v. Commonwealth, 20 Ky. Law Rep., 721; Am. & Eng. Ency. of Law, vol. 17, p. 919-927; Am. Digest Century Edition, vol. 27, secs. 444, 445.

2. The averment that the notary public who administered the oath "then and there had authority to administer" the same is a sufficient averment of his authority: McClain on Criminal Law, vol. 2, p. 875; Ency. of Pl. & Prac., vol. 16, p. 325; Johnson v. People, 94 Ill., 505; People v. Phelps, ' Wendell N. Y., 9; Commonwealth v. Weingartner, 15 Ky. Law Rep., 221; Commonwealth v. Kane, 92 Ky., 457; Commonwealth v. Still, 83 Ky., 275.

3. The statements of fact alleged to have been made by the defendant are properly negatived by special averment when, corresponding to each and every such statement, there is a statement of fact averred by the pleader to be true, which statement is ex-

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actly opposite to the statement alleged to have been made by the defendant: Commonwealth v. Still, 83 Ky., 275; Commonwealth v. Weingartner, 16 Ky. Law Rep., 221; Commonwealth v. Porter, 17 Ky. Law Rep., 554.

EDWARDS & OGDEN for appellee.

The only question raised by this appeal is whether the trial judge erred in sustaining the demurrer to the indictment.

POINTS AND AUTHORITIES.

The demurrer was properly sustained—

1. Because the indictment had no caption: Secs. 122, 123, 124, Cr. Code.

2. Because the accusatory part of the indictment stated no offense: Tupman v. Commonwealth, 17 Ky. Law Rep., 217; Commonwealth v. Taylor, 96 Ky., 394, and the authorities therein quoted.

3. Because the indictment does not properly charge that appellee was an officer of election, and does not charge that an election was held in this precinct, but does affirmatively charge that there was held in this precinct a pretended election which was illegal, null and void: Harvey Brown v. Commonwealth, opinion of May 16, 1906.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

The following indictment was returned by the grand jury of Jefferson county against appellee: "The grand jurors of the county of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, accuse Frank G. Drewry of the crime of unlawfully and feloniously certifying to an improper certificate of election committed in manner and form as follows, to-wit: That on the 7th day of November, 1905, there was held under the laws of the State of Kentucky, in the city of Louisville, in the county of Jefferson, an election of county, city and legislative

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officers, and officers of election were appointed under, and in accordance with, the laws of Kentucky, to serve as such in the Thirty-Eighth Precinct of the Twelfth Ward; that the said Frank G. Drewry was duly so appointed to serve as clerk of election in said precinct, under color of authority given him by which said appointment, he, the said Frank G. Drewry, did knowingly and wilfully cretify to an improper certificate of election, purporting to be the correct and proper certificate of election purported in said certificate to have been held on November 7, A. D. 1905, which certificate was made out and certified to in manner and form as follows, to-wit: (Then follows the certificate in full, and lengthy statement showing that the polls were not opened or the election held at the place appointed, but that, in violation of law, and without observing any of the requirements necessary, the voting place was moved, and the polls opened at another place, and the election there held.) Furthermore, that the said certificate was false and fraudulent, not being a true or correct record of the number of votes actually cast by voters in said precinct at the said pretended election, as the said Frank G. Drewry then and there well knew at the time he certified to the said certificate that the said certificate was false and fraudulent in these particulars, namely, to-wit: The said certificate contains the statement that there were 301 ballots cast in the said pretended election, and that there were 298 ballots counted as valid; whereas, in fact there were not 301 ballots actually cast in the said pretended election by duly qualified voters, but certain duly qualified and legal voters did not go to the said voting place established as hereinbefore set forth near to the corner of Thirtieth and Walnut streets, and did not receive any ballots there, and did not place

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any ballots in the box provided for that purpose. That the said qualified and legal voters are as follows: A. G. Knapp, living at No. 3600 West Chestnut street and Mike J. Kleinheinz, living near the corner of Thirty-First and Magazine streets. That nevertheless the certificate hereinbefore set out was purportedly based in part upon ballots fraudulently pretended by the persons who acted as officers of election at the said voting place established by them at Thirtieth and Walnut streets to have been actually and legally cast by the said A. G. Knapp and the said Mike J. Kleinheinz, and also of a ballot of which the stub was numbered 24 so pretended to have been cast by one C. Fosser living at No. 1707 Twenty-Eight street, but which was not cast by the said C. Fosser. That in these respects, and to this extent, and by reason of the aforesaid fraudulent pretensions, the said certificate was false and incorrect, as the said Frank G. Drewry then and there well knew, at the time when he certified to the same. That such wilful certifications to the aforesaid incorrect certificate was contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the Commonwealth of Kentucky."

To this indictment a demurrer was sustained, and in support of the ruling of the trial judge it is insisted that the indictment is fatally defective, because it has no caption; second, because the accusatory part of the indictment states no, offense; third, because the indictment does not properly charge that appellee was an officer of election, or that an election was held in the precinct, but does affirmatively charge that there was held in this precinct a pretended election, which was illegal and void. These several objections we will notice in the order named.

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In section 123 of the Criminal Code of Practice there is a form of indictment, which contains the style of the prosecution and the court in which it is pending, as: "The Commonwealth of Kentucky against George Smith. Franklin Circuit Court." Under section 124 of the Criminal Code of Practice, the indictment "must be direct and certain as regards the party charged; the offense charged; the county in which the offense was committed." And section 122 provides that the indictment must contain "the title of the prosecution, specifying the name of the court in which the idictment is presented, and the names of the parties." But it is not essential to the validity of the indictment that this matter shall appear in the caption, as the caption is not an indispensable part of the indictment. It will be sufficient if it is set out in the body of the indictment. At best, the caption is merely a form, and neither takes from nor adds to the validity of the indictment. Mitchell v. Com., 106 Ky. 602, 21 Ky. Law Rep. 222, 51 S. W. 17; Bishop's New Criminal Procedure, section 661; Warton, Criminal Law, sections 219, 220. In the indictment before us, the caption is omitted; but we do not regard this omission as either fatal or material. It appears that it was found by the grand jury of Jefferson county, and in the name of the Commonwealth of Kentucky it accuses the defendant of the crime described, and shows beyond cavil that it was committed in Jefferson county — thus containing every feature that might have been inserted as the caption.

Section 1585a of the Kentucky Statutes of 1903 provides that: "Any officer of the election who shall knowingly and wilfully give or certify to an improper certificate of the election as herein required * * * shall be guilty of felony, and upon conviction thereof

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shall be confined in the penitentiary for a period of not less than one nor more than three years." The accusatory part of the indictment charges the defendant with "unlawfully and feloniously" certifying to an improper certificate of election. It would have been more correct to have charged defendant in the language of the statute with "knowingly and wilfully" certifying to an improper certificate of election. If it was essential that the accusatory part should accurately describe the offense, the indictment would be defective, because there is a marked difference between "unlawfully and feloniously" doing a thing and "wilfully and knowingly" doing it. Words of this character, when found in the statute as descriptive of an offense, or words of similar import, or, in the language of section 136 of the Criminal Code of Practice, "words conveying the same meaning," should be used. Com. v. Scroggin, 60 S. W. 528, 22 Ky. Law Rep. 1338. But we do not regard the use of these erroneous words as fatal to the indictment. If they had been omitted entirely, or if they be regarded as mere surplusages, the indictment would yet be good, as in its body the correct words are employed. Com. v. Schatzman, 82 S. W. 238, 26 Ky. Law Rep. 508, 118 Ky. 624; Knoxville Nursery Co. v. Com., 55 S. W. 691, 21 Ky. Law Rep. 1483. In support of the ruling of the lower court on this point, our attention is directed to Commonwealth v. Taylor, 96 Ky. 394, 29 S. W. 138, 16 Ky. Law Rep. 482, Com. v. Turner, 8 Bush, 1 and Com. v. Tupman, 30 S. W. 661, 17 Ky. Law Rep. 217. In the Turner Case, the indictment charged Turner with "unlawfully" killing a horse, whereas, the statute denounced a penalty against any person who "wilfully" killed a horse; and it was held not to be good upon the

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ground that the pleader should have used the word "wilfully" in place of the word "unlawfully"—the words having entirely different meanings. In the Taylor Case, the indictment assailed in its body charged the defendant with "unlawfully and feloniously" making a false oath, instead of averring in the language of the statute that he "knowingly and wilfully" swore falsely; and the indictment for this reason was adjudged insufficient. In both of these cases, the defect was not in the accusatory part, but in the body of the indictment, and they are not pertinent to the question now under consideration. It is to the descriptive part of the indictment that we look for information concerning the offense charged. Hence, it is necessary that more care should be used in describing the offense in the body of the indictment than in the accusatory part of it, and a distinction along these lines has always been recognized. In Commonwealth v. Tupman, 30 S. W. 661, 17 Ky. Law Rep. 217, the accusative part of the indictment charged the defendant with the crime of "malicious shooting," and the court rules that "malicious shooting" was not an offense, unless followed by language pointing out that the person accused shot, or without wounding shot at, another person, or shot at or into a railroad passenger coach, or steam boat, thereby committing an offense denounced by the statute; that charging a person with "malicious shooting" did not give him any information of the particular offense he was charged with, as four distinct and separate offenses may be committed in the act of malicious shooting. Such is not the case in the indictment before us. Omitting the words "unlawfully and feloniously," the accusation is that Drewry committed the crime of certifying to an improper certificate of election, and, as this offense

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can only be committed in one way, the defendant could not have been misled by the language employed.

We do not regard the objection that the indictment does not sufficiently aver that appellee was an officer of election well taken. It charges in terms that an election was held under the laws of the State, and that "officers of election were appointed under and in accordance with these laws, to serve as such in the Thirty-Eight precinct of the Twelfth Ward, and that the said Frank G. Drewry was duly so appointed to serve as clerk of election in said precinct." This allegation sufficiently stated his connection as an officer with the election. It was not necessary that the indictment should set out when or by whom he was appointed or selected. The averment that he was duly appointed to serve as clerk of the election is more than a mere conclusion of the pleader. It is a substantial statement of fact. It would add nothing to the validity of the indictment to state with more particularity the facts relating to his appointment to this office; nor would it give him any fuller information of the fact that the accusation was for a crime committed as an officer of the election. Commonwealth v. Brown, 93 S. W. 605, 29 Ky. Law Rep. 434. It is distinctly charged that, as such officer Drewry wilfully and knowingly certified that a certain number of votes were cast at the election, when he knew that they had not been cast; and although the indictment is not aptly drawn, and contains an unusually large quantity of surplus matter, yet it states no offense under the statute.

In considering the sufficiency of an indictment, the whole of it must be looked to. The essential and indispensable requisites in the particulars under consideration are that it shall contain "a statement of

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the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and with such degree of certainty as to enable the court to pronounce judgment on conviction according to the rights of the case" (section 122), "and must be direct and certain as regards the party charged, the offense charged, and the county in which the offense was committed" (section 124). If the charge is a statutory offense, then the words of the statute, or words having the same meaning, must be used; if it be a common-law offense, the forms of the common law must be followed. Com. v. Grinstead & Tinsley, 55 S. W. 720, 108 Ky. 59, 21 Ky. Law Rep. 1444; Ward v. Com. 14 Bush, 233; Mitchell v. Com. 88 Ky. 349, 10 Ky. Law Rep. 710, 11 S. W. 209. There are other minor requisites in the preparation of an indictment that a good pleader will observe, but their omission will not invalidate the indictment.

In addition to these general observations applicable to all indictments, it is especially provided, in section 1591 of the Kentucky Statutes of 1903, that the provisions of the chapter relating to elections "shall be liberally construed so as to prevent any evasion of its prohibitions and penalties by shifts or device." This statute was enacted to prevent persons charged with offenses against the election laws from escaping just punishment on mere technicalities and minor irregularities; and while this statute was not intended to, and does not, abrogate the Code provisions relating to the essential elements necessary to constitute a good indictment, it should be read in connection with them, as illustrating the legislative intent concerning prosecutions of offenses against the election laws.

In our opinion the lower court erred in sustaining

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a demurrer to the indictment, and the judgment is reversed for proceedings consistent with this opinion.

CASE 26.—ACTION BY TRUSTEES OF COMMON SCHOOL DISTRICT NO. 54, ETC., AGAINST W. T. GIVEDEN, COUNTY SUPERINTENDENT OF HENRY COUNTY AND OTHERS.

Givіden, County Supt., Etc., v. Trustees School District No. 54

Appeal from Henry Circuit Court.

R. F. PEAKE, Circuit Judge.

Judgment for plaintiffs, defendants appeal.—Reversed.

1. Schools and School Districts—Creation of New Districts.—Under Ky. Stats., 1903, Sec. 4427, providing that the boundary of a school district cannot be changed, unless notice in writing shall be given to the trustees of the districts to be affected, and Sec. 4437, creating the trustees of school districts a body politic and corporate, with authority to contract in their name as trustees, etc., a notice by a county superintendent of his purpose to make a new district out of territory included in existing districts, directed to the trustees of the districts affected, and served on the chairman of the respective trustees, was sufficient.
2. Same—Decision of School Officers—Review.—The determination of the cases of extreme emergency within Ky. Stats., 1903, Sec. 4428, providing that no school district established shall include less than forty-five pupil children, except in cases of extreme emergency, is confided, in the first instance, to the county superintendent, who acts judicially, and, in case he errs, an appeal may be prosecuted to the superintendent of public instruction, and when these officials have determined that an extreme emergency exists, the courts cannot inter-

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fere unless the power to act did not exist for want of notice required by Sec. 4427, or unless the power was manifestly abused.

3. Same—Ky. Stats., 1903, Sec. 4428, prohibits the establishment of school districts including less than forty-five pupil children. The county superintendent of a county created a new school district out of territory included within three existing districts. One of the existing districts had a school population of over eighty, and after the change it had forty-three pupil children within the district and three children of a resident of the district, who were outside of the district. Held that, as the domicile of the children was prima facie the domicile of the parent, the three children must be included in the census of the district, and thereby make the number of pupil children in the district more than forty-five.

TURNER & TURNER for appellant.

AUTHORITIES CITED.

Kentucky common school laws, secs. 30, 56, 41, 65, 66, 37; Farley v. Gilbert, 24 Ky. Law Rep., 2109; also common school laws, secs. 36, 56, and Code of Practice of Kentucky, sec. 628; Howard v. Furster, 22 Ky. Law Rep., 843.

N. C. CURETON for appellee.

SANDFORD, CURETON & DOUTHETT of counsel.

POINTS MADE AND AUTHORITIES CITED.

1. The acts of the superintendent in changing the boundaries of appellee's district, and of Districts 6 and 45, are void, because ten days' notice in writing was not given to the trustees thereof. If notice to the chairman of the board is a substantial compliance with the statute, which we deny, the change of the boundary of appellee's district is void, because it is admitted that no notice was given to Bragg Barton, the chairman of said district: Ky. Stats., sec. 4427; Howard, etc., v. Forester, etc., 22 Ky. Law Rep., 843; Noble, superintendent, v. White, 25 Ky. Law Rep., 1282; sec. 418, statute 1898, Wis., State ex rel. v. Graham, 60 Wis., 395; State ex rel. Bidgood v. Supervisors, etc., 113 Wis., 107; Clearfield Independent School dist., 79 Pa. State, 419.

2. All school districts must have not less than forty-five pupil children; that is, districts established since the act of July 6,

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1893, known as the school law, and the one exception to the rule is in cases of extreme emergency. On March 16, 1907, there were sixty-nine pupil children in District 54; but when its boundary was changed on that day and during that month it was left with only forty-three pupil children. A school house inconvenient to seven or eight pupils does not create an emergency as contemplated in the school law, and authorize the formation of a new district: Ky. Stats., sec. 4428; Anderson v. Green, etc., 21 Ky. Law Rep., 1439.

3. The county superintendent has no official record showing any changes in the boundaries of said districts. His attempt to change the boundary of appellee's district is void, because there is no official record of it: Ky. Stats., sec. 4429; Mouser, etc., v. Spaulding, etc., trustees, 29 Ky. Law Rep., 1071.

4. Bragg Barton having the shortest term of service as trustee of School District 54 (appellee's), was the chairman of said district board, and had never been removed or relinquished said place. The law prescribes a penalty when a trustee neglects to perform his duty, but it has never been invoked in this case: Ky. Stats., secs. 4434, 4555.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

This action was brought by appellee to restrain the county superintendent of schools in Henry county from changing the boundary of common school district No. 54. The facts necessary to an understanding of the points to be decided are these: District No. 54 had existed for a number of years. The number of pupil children within the district had varied from 80 to 103 for several years before the redistricting complained of. The district was about five miles long, and some two or three miles wide. Adjoining it to the north were districts Nos. 6 and 45. The superintendent gave notice in writing to the trustees of the three districts named of his purpose to make a new district out of parts of the three. The parties interested appeared before the superintendent, who heard the

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reasons in favor of creating a new district, as well as the protests against it. His conclusion was that the interest of the children within the territory affected required the creation of the new district, and consequently determined to make it. Whereupon this action was filed by appellees, and an injunction obtained restraining the superintendent from carrying his decision into effect. The two grounds relied upon by appellees are (1) that the notice required by the statute was not given; and (2) that the change would leave district No. 54 with less than 45 pupil children.

Section 4427, Ky. St. 1903, provides that the boundary of a district shall not be changed unless 10 days' notice in writing shall first be given to the trustees of other districts to be affected thereby. The notices in this case were directed to the trustee of the respective districts, and were served upon the respective chairmen of the boards. By section 4437 of the statutes the trustees of school districts are created a body politic and corporate. They contract in their name as trustees, and are sued and sue, and are proceeded against in that style. The notice is not to the individual trustees, but to the body corporate. It was properly served upon the chairmen of the boards, and was not necessary to have been served upon each individual member. Like other bodies corporate, a service upon the chief executive is deemed sufficient. Section 4428 of the statutes provides in part: "No district hereafter established shall include less than forty-five pupil children except in cases of extreme emergency." It is claimed by appellees that this provision of the statutes was violated in two particulars in the action of the superintendent—one in that it left district No. 54 with less than 45 pupil children; and the other in that there was no extreme emergency for

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his action. It will be noticed that 45 pupil children is fixed as the minimum to authorize the creation of a school district, but the exception provided in the statute shows that a less number may constitute a district. The case of extreme emergency justifying the adoption of a less number is not specified in the statute. Nor does the statute expressly confide the decision of the matter to any particular tribunal. But we are of opinion that the purpose of the Legislature was to leave the government of school districts to the department of education. An elaborate and comprehensive system is provided. Over it all is the Superintendent of Public Instruction, who is authorized to prescribe rules and regulations for carrying the purpose of the Legislature into effect. A board of education, composed of the Superintendent of Public Instruction, Secretary of State, and Attorney General, is made the head of the educational system of the State so far as its public schools are concerned. The county superintendent is put in control of the various common schools of the county, and the trustees are put in charge of the interests of their respective districts. The determination of the cases of extreme emergency intended by the statute to apply must have been intended to be left to some or all of these officials. We are of opinion that it is confided in the first instance to the county superintendent. He acts judicially in the matter in a sense. He must exercise a judgment and discretion based upon his knowledge of the situation and the particular qualifications which he may possess for the discharge of the duties of his office. Should he err in the exercise of his judgment, an appeal may be prosecuted to the Superintendent of Public Instruction. When these officials have determined that an extreme emergency does exist, it must

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be a rare case when the courts would be authorized to interfere with their exercise of judgment in the matter. When the courts interfere at all, we think it must be upon the ground either of a lack of power in the official, or in its manifest abuse. The lack of power would exist where the county superintendent acted without notice, as was held in Anderson, Superintendent v. Green, etc. 55 S. W. 420, 21 Ky. Law Rep. 1439, or acted at a time prohibited by the statute. Section 4427, Ky. St. 1903. The abuse of the power must be such act as is corrupt, or from such lack of consideration as clearly indicates a failure to hear both sides, or a failure to exercise judgment. Under the facts of this case, we cannot say that either of the conditions above alluded to existed. Indeed, the contrary appears to be the truth. The superintendent seems to have exercised a fair judgment, to have heard patiently, and considered carefully, the views of the different factions. Nor are we prepared to say from the record that his decision was not correct.

It is conceded that the district after the change contained 43 pupil children. One Lindsey, a resident of the district, had three children within the school age at the time of the change. His children, however, were outside of the district, and had been for some year or so. There is nothing in the record to show that their homes had been permanently fixed at points outside the district. Prima facie the domicile of the father of an infant is the infant's domicile. These children would have had the legal right at any time upon returning to their father's home to have attended this school. Consequently they ought to have been included in the census for that district. This would have made the number of pupil children in the

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district more than 45. The judgment of the circuit court declared that the action of the superintendent was void. We are unable to concur in this conclusion on any ground.

Consequently the judgment must be reversed, and cause remanded, with directions to dismiss the petition.

CASE 27.—ACTION BY THE COMMONWEALTH AGAINST M. S. BARKER AND ANOTHER TO RECOVER MONEY ALLEGED TO BE WRONGFULLY WITHHELD.—June 19.

Commonwealih v. Barker

Appeal from Franklin Circuit Court.

R. L. STOUT, Circuit Judge.

Judgment for defendants, plaintiff appeals—Affirmed.

1. States—Officers—Recovery of Money Paid Under Mistake of Law.—Where an agent of the Auditor of State gave his whole time in good faith to the collection of license fees due the State, pursuant to the direction of the Auditor, and the State received the benefit of the work and expenses and paid a just compensation for the services rendered, the State could not recover the sum paid on the ground that it was paid under a mistake of law, without accounting to the agent for the expenses and services rendered.
2. Same—Actions—Counterclaim.—A defendant in an action by the State may maintain a counterclaim, though an action against the State will not lie, for the reason that a citizen cannot sue the State without its consent.
3. Pleading—Counterclaim.—A counterclaim is an independent action, and every allegation necessary to constitute an independent action is necessary to constitute a good counterclaim.
4. Appeal — Remand—New Trial — Counterclaim.—A defendant may set up a counterclaim after a judgment in his favor has

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been reversed on appeal and the cause remanded for new trial.

N. B. HAYS, ATTORNEY GENERAL, and C. H. MORRIS for appellant.

1. The State is not liable for the unauthorized acts of its officers; and if such acts are not within the scope of their authority, they are not official acts; and the State cannot be made liable upon either an expressed or implied contract, or upon a basis of quantum meruit.

2. If the consideration of an express contract is illegal, the contract is void, and cannot constitute the basis of an action, or a ground of defense; and, for a greater reason that that which is illegal, either at common law or by statute, cannot be the consideration for an implied contract: Collins v. Merrell, etc., 59 Ky. (2 Met.), 164; 2 Bibb, 500; 6 Dana, 91; 8 B. Mon., 98; 8 B. Mon., 90; Bank v. King, 44 N. Y., 87; James v. Jellison, 94 Ind., 292; 9 Cyc., 740.

3. We contend that under the following authorities the trial court erred in permitting the amended answer to be filed; in overruling the demurrer of the State thereto; in not sustaining the State's plea of res judicata; in transferring to equity; in confirming the commissioner's report and its judgment, and on the return there was nothing to do except to ascertain how much had been paid appellee, Barker, within five years next before the filing of the action: Sims v. Reed, 51 Ky., 12; B. Mon., 51; Davis v. McCorke, 14 Bush, 746; Francis v. Woods, 81 Ky., 16; Cason v. Grant Co. Deposit Bank, 16 Ky. Law Rep., 447; Bean v. Meguiar, Helm & Co., 20 Ky. Law Rep., 885; Burnett v. Commonwealth (for use), 21 Ky. Law Rep., 695; Thompson v. Louisville Banking Co., etc., 21 Ky. Law Rep., 1611; Stacy v. Vermont Cent. R. Co., 32 Vt., 552; A. & E. E. of Law, 1st ed., vol. 23, p. 33.

4. The trial court erred in transferring the case to the equity docket. It is the contention of the State that the amended answer did not present any equitable defense whatever, and the court arbitrarily and without any authority to do so, denied the State the constitutional right of trial by jury: Civ. Code, sec. 11; Creager v. Walker, 7 Bush 1; Corder v. Weisenburgh, 95 Ky., 135; O'Conner v. Henderson Bridge Co., 95 Ky., 633.

W. S. PRYOR and HELM & HELM for appellee.

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Commonwealth v. Barker.

POINTS AND AUTHORITIES.

1. Where a citizen, in good faith and under a belief that it was his duty to do so, expends money and does work for the State from which it undoubtedly receives substantial benefit, and under a mistake of law the person is paid a commission supposed to be authorized by statute, that person in suit by the State may, upon the plea of a counter-claim, be allowed the reasonable value of his services and his actual disbursements: Commonwealth v. Lyon, 24 Ky. Law Rep., 1747.

2. Money paid under a mistake of law cannot be recovered.

(a) When the plaintiff has received a substantial benefit.

(b) When defendant receives it in good faith in satisfaction of an equitable claim.

(c) Nor when it was due in honor and conscience: Greenleaf on Evidence, sec. 123, and authorities there cited.

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

This action was instituted in the Franklin circuit court by the Commonwealth of Kentucky to recover of L. C. Norman, ex-Auditor of the State, and M. S. Barker, his agent, a large sum of money of which it was charged they had wrongfully and fraudulently deprived the State. The petition charged that the Auditor and his agent had entered into a fraudulent conspiracy by which the former paid over to the latter large sums of money as fees for certain illegal services pretended to have been rendered with reference to the collection of back license taxes. The defendant answered, denying all the allegations of the petition; then pleaded affirmatively in the second paragraph that the agent had rendered the services and collected the back license taxes for the State under the advice of the Attorney General, who, when the question was submitted to him, advised that it was the duty of the agent to perform the services, and that he was entitled to the fees allowed by the law for

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such work; that this construction of the statute had existed and been put in operation by all the officers of the State for many years, and recognized by the Legislature as the correct construction of the statute, and that the services were performed under the direction of the Auditor, who acted under the legal advice of the Attorney General; and pleaded the contemporaneous construction of the statute, and the performance in good faith of the work as a defense to the action. The trial court sustained a general demurrer to the second paragraph of the answer, holding that, as the petition charged a fraudulent conspiracy, the Commonwealth would have to recover on that ground alone, and that the second paragraph was not a good defense to the charge of fraudulent conspiracy to rob the State. The case came on for trial upon the allegations of the petition and the denials of the first paragraph of the answer. The Commonwealth utterly failed to sustain its allegations of a fraudulent conspiracy, and contented itself alone with showing that the work had been done and the money paid to the agent. At the close of the plaintiff's testimony the trial judge gave a peremptory instruction to the jury to find for the defendant on the ground that there was no evidence to support the charge of fraudulent conspiracy or other wrongdoing on the part of the defendants, or either of them. Upon appeal this judgment was reversed; the court holding substantially that the Commonwealth was entitled to recover fees paid without warrant of law, although there was no evidence of any corrupt bargain between the Auditor and his agent. This was the sole question before the court, and any general language in the opinion which seems to go beyond this is dictum.

When the case returned to the trial court the defend-

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ant Barker was permitted to refile his answer, to which theretofore a general demurrer had been sustained, and he was also permitted to amend by adding a paragraph in which he alleged that he had performed very valuable services for the Commonwealth of Kentucky, and expended large sums of money of his own in so doing, and had given his time and attention exclusively to the work; that the revenues of the State had been largely increased by reason of his work, and that the State had accepted the results of his labor and the expenditure of his money; and that he was entitled to recover the reasonable value of his services, as well as the money expended by him in performing the services for which the State had obtained the benefit. The case was referred to the commissioner to take proof and report the reasonable value of appellee's services and his money outlay. The commissioner reported that, in performing the service of collecting the license fees, he had employed agents whom he had paid in the aggregate the sum of $5,377.05, and that his own services were reasonably worth 20 per cent of the amount covered into the treasury, and that these two items constituted a just and lawful counterclaim against the Commonwealth. No exceptions were filed by the Commonwealth to the report of the commissioner, and upon final hearing, a judgment was awarded allowing the counterclaim shown to be due by the commisisoner's report; and of this judgment the Commonwealth now complains.

The evidence shows that M. S. Barker was appointed auditor's agent by Gen. Fayette Hewitt long before the origin of this litigation; that Hewitt, as the general fiscal official of the State, had ascertained that the revenue of the Commonwealth from license fees had very largely depreciated, and especially was

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this true in Jefferson county, Ky., the district in which appellee was auditor's agent; that Hewitt thereupon ordered his agent to take up this work, and to enforce the collection of all past-due licenses. The appellee was loath to perform this work, but his superior in office informed him that he had taken the advice of the Attorney General, who was of the opinion that the work was a part of the agent's duty, and therefore the agent must do it, whereupon the appellee employed other persons, whose assistance was necessary to the thorough performance of the duty, and entered upon the discharge of these newly imposed duties. It had become largely the custom in Louisville and Jefferson county for persons who carried on business for which a license was required to operate the business without paying the license, and running on indefinitely without accounting to the Commonwealth for the money due for conducting the business. This was especially true in the liquor business, but it was also true, though to a less degree, in every other business for which a license was charged. Now, appellee under the direction of the Auditor hunted up all such persons, and either by indictment or threat of the same forced them to take out a license; and, where they had been doing business for any length of time without a license, he required the county clerk to antedate it to the original period at which it should have been issued, and the party was thus required to pay to the State the license demanded by law for the whole period of time during which he had been doing business. In this way the State was saved the loss of the license fees for the time between the date at which the party had commenced business and the time at which he finally took out his license. It needs no argument to show that this was highly beneficial to the interest

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of the State, and that but for this work large sums of money would have been lost to it; and this the evidence shows without any sort of attempt at contradiction. The evidence abundantly shows that the revenue of the State from the source of license fees was enormously increased during the time when appellee was engaged in looking after the collection of this branch of the revenue. Indeed, the Commonwealth makes no pretense of controverting the fact that the labors of the appellee were highly beneficial to the State, but contends that although the State received the services and they were beneficial, yet, unless there is an express warrant of law, he cannot recover on quantum meruit, and that the trial court erred in permitting the defendant (appellee) to amend his answer and set up a counterclaim after the return of the case from the Court of Appeals.

We cannot concur in this conclusion. The record shows without a shadow of contradiction that appellee in the utmost good faith undertook, in obedience to the commands of his superior, who had a right to direct him, to perform, and did perform for a long period of years, very valuable services to the Commonwealth; that from time to time, as he covered money into the treasury as the result of his labor, the Auditor drew his official warrant on the Treasurer in favor of the agent for the fees which they believed the law authorized to be paid. These warrants were paid by the Treasurer in due course; that a very large part of the money so paid to him the agent paid over to those whom he had employed to assist him in doing the work of which the State received the benefit. This work, as said before, was performed over a long series of years. It was done at the instance and under the direction of two Audit-

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ors, Hewittt and Norman, and two Attorneys General, Hardin and Hendricks, the two latter of whom rendered opinions to the effect that it was the duty of the agent to do the work and that he was entitled to be paid therefor. During this long period of time that this work was being so done and so remunerated, the Legislature met from time to time, and it is common knowledge that the accounts of the Auditor are examined and passed upon by each Legislature that assembles. That the legislative branch of the government did not disapprove of the construction placed upon the law by the Attorneys General and Auditors mentioned may fairly be presumed from the fact that no change was made in the law, or objection to the payment to the agent.

Assuming, then, that the appellee for a considerable number of years gave his whole time in good faith to the performance of certain duties imposed upon him by his superiors in office, and which was highly advantageous to the State, and which cost him money in a large sum, can the State, after receiving the benefit of the agent's work and his outlay, and after paying over to him a fair and just remuneration, now recover from him the sum so paid, under the theory that it was paid under a mistake of law, without accounting to him in any wise for his money expenditure or the loss of his time? Greenleaf in his work on Evidence volume 2, section 123, thus states the rule: "Nor can money paid under a mistake of facts be reclaimed where the plaintiff has derived a substantial benefit from the payment; nor, where the defendant received it in good faith in satisfaction of an equitable claim; nor, where it was due in honor and conscience." Certainly it will not be contended that the appellee was not in honor and

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good conscience entitled to be remunerated for his valuable services; and if the question here involved was between individuals nobody would have the slightest doubt of the right of the appellee, as a matter of law, to be remunerated for his services. The Commonwealth cannot be permitted to allow one to go on year after year laying out his money for its benefit, and giving his whole time and services for its advantage, and, after paying him for such services, then, after a long period of time, to recover it from him as money paid under a mistake of law, and leave him without any sort of recourse. Certainly, if appellant was an individual, no one would hesitate to say that this conduct would be inequitable and unjust.

The very question we have here arose in the case of Commonwealth v. Lyon, 72 S. W. 323, 24 Ky. Law Rep. 1747, which involved these facts: H. B. Lyon, J. M. Thomas, and W. Carpenter were appointed in April, 1884, as commissioners to superintend the building of the branch penitentiary at Eddyville for the Commonwealth. The contract to do the work and supply the material was let to Mason & Co. and O'Conner & Brewster. After the work had gotten under way the State failed, for reasons not given, to make sufficient provisions of funds for carrying on the work, whereupon the contractors abandoned it. Thereupon the commissioners, without any contract with the State, and without any specific warrant of law therefor, but under the advice and at the request of the sinking fund commissioners, who had general supervision of the matter, undertook to complete the building with such funds as the State afterwards furnished, and did finally complete the structure. Now, under the law these commissioners were entitled to

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their traveling and necessary official expenses, but nothing for their supervisory work. It was originally contemplated that they should visit the penitentiary building from time to time to see that the contractors were keeping the terms of their contract with the State; but it was not originally intended that they should receive anything for the supervisory work. When the contractors abandoned the building, the commissioners, in order to prevent loss to the State, under the advice and direction of the sinking fund commissioners, gave a great deal of supervisory time to the building, and after it was completed they were paid their official and traveling expenses but nothing more, whereupon they made claim against the State to be paid for the value of their services in supervising the work, basing it upon the ground that these services were very valuable to the Commonwealth, and that they were given in good faith, under the direction of the sinking fund commissioners, and that the State had received and accepted them, although there was no contract or law authorizing the remuneration. In order that they might present their legal claim against the State, the Legislature passed an act waiving its sovereign prerogative of not being sued, and authorized the commissioners to sue and recover whatever was due them in law or in equity. This act did not create a cause of action which the commissioners did not theretofore have. It simply gave them a remedy of bringing the soverign before the court, which they would not have had without it. The trial court gave a judgment for the full value of the commissioners' services, being the sum of $4,000, with interest, as prayed for in the petition. The then Attorney General deeming that the judgment was just, so far as the principal of the claim was con-

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cerned, appealed only from so much of it as gave interest from the time of the institution of the action. On appeal the judgment was affirmed. Commonwealth v. Lyon, 72 S. W. 323, 24 Ky. Law Rep. 1747. In the opinion it is said: "When the Legislature gave its consent that the sovereign might be sued, it left it to the court to determine what, if any, recovery should be had, and the same discretion existed with reference to interest as in other cases. The only difference between the sovereign and an individual is that it requires the sovereign's consent to be sued, but, when that consent has been obtained, then the court has the right to determine the question of interest, as it would have in a suit of one citizen against another."

When the State sued appellee, he became at once entitled to maintain any counterclaim he had against it, although he could not have set up the counterclaim as an original cause of action, for the reason that a citizen cannot sue the State without its consent. Commonwealth v. O. & M. R. R. Co., 81 Ky. 572, 5 Ky. Law Rep. 650; Commonwealth v. Todd, 9 Bush, 708. The fact that appellee did not set up his counterclaim before the second trial does not conclude his right so to do. A counterclaim is really an independent action, and every allegation necessary to constitute an independent action is necessary to constitute a good counterclaim; and, although a party may set up a cause of action as a counterclaim to a suit brought against him, his failure so to do does not conclude his right to afterwards bring his suit. The appellee might have waited until after the judgment against him and executior issued, and then set up his counterclaim against its enforcement. Emerson v. Herriford, 8 Bush, 229; Chinn v. Mitchell, 2 Metc.

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92; Ross v. Ross, 3 Metc. 274 and Moss v. Rowland, 1 Duv. 322. Appellee's right to maintain his counterclaim is strengthened by that line of cases which hold that the State is entitled to recover against a lunatic's estate on a quantum meruit its reasonable expense for his keep and maintenance at its asylum, although by reason of defects in the proceedings in the inquest of lunacy the judgment is void, and recovery could not be had under the statute.

For the foregoing reasons, the judgment is affirmed.

Barker, J., not sitting.

CASE 28.—CONSOLIDATED ACTIONS BETWEEN KATE L. HIGGINS' TRUSTEE AND THE COMMONWEALTH: FANNIE H. KEMP'S TRUSTEE AND THE CITY OF LEXINGTON AND KITTIE G. FORSYTHE AND THE CITY OF LEXINGTON ON THE QUESTION WHETHER INTANGIBLE PROPERTY IN THE POSSESSION OF A TRUSTEE IS LIABLE TO TAXAION. —June 19.

Higgins v. Commonwealth
Kemp's Trustee v. City of Lexington
Forsythe v.Same

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126 211
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126 211
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Appeal from Fayette Circuit Court.

WATTS PARKER, Circuit Judge.

From the judgment the plaintiffs appeal.—Affirmed.

Taxation—Property Liable—Property of Non-residents in Hands of Resident Trustee.—Const. Sec. 172 provides that all property not exempt shall be assessed for taxation at its fair cash

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value. Ky. Stats., 1903, c. 108, Sec. 4020, provides that "all real and personal property within the State * * * shall be subject to taxation, unless the same be exempt from taxation by the Constitution. * * *" Sec. 4022 provides that "for the purposes of taxation real estate shall include all lands within this State, and improvements thereon; and personal estate shall include every other species and character of property, that which is tangible as well as that which is intangible." Sec. 4058 requires that a trustee list property held by him in such capacity in the name of the real owner. Held, that notes, bonds and other securities owned by non-residents, but in the hands of a resident fiduciary for the purpose of controlling and investing, are taxable at the place of his residence.

J. D. & G. R. HUNT for appellants.

POINTS AND AUTHORITIES CITED.

1. Intangible personal property in the hands of a trustee is taxable at the residence of the real owner of the fund, and not at the residence of the trustee, whether such real owner be a resident or non-resident of the State of Kentucky: Ky. Stats., sec. 4020; City of Lexington v. Fishback's trustee, 109 Ky., 770: 22 Ky. Law Rep., 1392; Harting's ex'or. v. City of Lexington, 19 Ky. Law Rep., 1829; Board of Council of Frankfort v. Fidelity Trust & S. V. Co., 111 Ky., 667; 23 Ky. Law Rep., 908; Deposit Bank of Owensboro v. Daviess County, 102 Ky., 214; Commonwealth of Kentucky v. Bank of Commerce, 81 S. W., 679; 26 Ky. Law Rep., 407; Boske v. Safety Vault Co., 22 Ky. Law Rep., 181; City of Louisville v. Shirley, 80 Ky., 72; Cooley on Taxation, p. 1; Cheaney v. Hooser, 9 B. Mon., 341-6; Lexington v. McQuillan's heirs, 9 Dana, 513; Union Refrigerator Transit Co. v. Commonwealth of Kentucky; Advance Sheet Supreme Court, decided No. —, 1905; Johnson v. City of Lexington, 14 B. Mon., 661; Commonwealth of Kentucky v. Bradley-Watkins Tie Company, 27 Ky. Law Rep., 541; Covington v. Pullman Company, 28 Ky. Law Rep., 200; Ayer & Lord Tie Co. v. Keown, 28 Ky. Law Rep., 201.

2. Intangible personalty held by a trustee for a non-resident is not taxable for city purposes, even though the trustee resides in such city: Ky. Stats., sec. 3174, and cases cited above.

WM. ROGERS CLAY and L. J. MOORE for appellees.

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POINTS AND AUTHORITIES CITED.

1. The legislature has provided for the taxation of such property by the State and county, and by municipalities of the second class: Ky. Stats., secs. 4020, 4022, 3174, 3179; Baldwin v. Shine, 84 Ky., 502; Boske, sheriff, v. Security Trust & Safety Vault Co., 22 Ky. Law Rep., 181; Detroit v. Lewis, 109 Mich., 155; in re Allman, 17 R. I., 362; Guthrie v. Pittsburg, C., C. & St. L. R. Co., 158 Pa. Stats., 433; Whiting's estate, 150 N. Y., 27; Board of Council of town of Nicholasville v. Rarick, 19 Ky. Law Rep., 1415; Youtsey, receiver, v. Commonwealth, 22 Ky. Law Rep., 1914.

2. The legislature had the power to enact the laws above set out: Cooley on Taxation, 3d ed., vol. 1, p. 86; Am. & Eng Enc. of Law, 1st ed., vol. 22, p. 133; Price v. Hunter, 34 Fed Rep., 355; In Board of Commissioners v. Leonard, 57 Kan., 531; Johnson, sheriff, v. Bradley-Watkins Tie Co., 27 Ky. Law Rep., 540; City of Covington v. Pullman Co., 28 Ky. Law Rep., 200; Bristol v. Washington County, 177 U. S., 141, Law ed. 705; New Orleans v. Stemple, 175 U. S., 317.

3. The property in question enjoys the protection of the laws, though under the new Constitution the right of taxation no longer depends upon the benefits received by the property: Louisville Bridge Co. v. City of Louisville, 22 Ky. Law Rep., 703; Ayer & Lord Tie Co. v. Keown, Sheriff, 28 Ky. Law Rep., 201.

4. The cases quoted by counsel for appellant are easily distinguished from the cases under consideration: City of Lexington v. Fishback's trustee, 22 Ky. Law Rep., 1392; Harting's extrx. v. City of Lexington, 19 Ky. Law Rep., 1829; Board of Councilmen of City of Frankfort v. Fidelity Trust and Safety Vault Co., 23 Ky. Law Rep., 908; Baldwin v. Shine, 84 Ky., 502; Youtsey v. Commonwealth, 28 Ky. Law Rep., 914.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

These three appeals, involving substantially the same question of law, will be disposed of together.

Is intangible personal property, such as notes, mortgages, and bonds, held by and in the possession of a trustee in this State, who manages and controls it, liable for taxation for State, city and county purposes, at the residence of the trustee, when the cestui

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que trust is a nonresident of the State? The property in question was not temporarily in the State. The trustee in whose custody it was, exercised complete control over it by loaning it out, investing the proceeds, and collecting interest. This being true, the property had an actual situs in this State, and was subject to taxation. The question involved is interesting, important, and practical, because it will directly affect the interests of all nonresidents of this State for whose use and benefit intangible personal property is held by resident fiduciaries. The authority to tax is vested in the State, and the municipality and taxing districts created by it, and is supreme, subject to constitutional and statutory limitations and regulations, and each State is left free to determine for itself the character of property that shall be taxed, the amount of taxes that shall be imposed, and the method of assessing it for taxation. In this State the Constitution designates the property that shall be exempt from taxation, and provides that taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and that all property not exempt shall be assessed for taxation at its fair cash value. In pursuance of these constitutional requirements, the General Assembly enacted the system of laws regulating revenue and taxation found in chapter 108 of the Kentucky Statutes of 1903; these laws being in force at the time the property in controversy was sought to be taxed. In section 4020 of this chapter it is provided in part that "all real and personal property within this State * * * shall be subject to taxation, unless the same be exempt from taxation by the Constitution; and shall be assessed at its fair cash value estimated at the price it would bring at a fair volun-

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tary sale." Section 4022: "For the purpose of taxation, real estate shall include all lands within this State, and improvements thereon; and personal estate shall include every other species and character of property, that which is tangible as well as that which is intangible." The interrogatories to be propounded by the assessor to each taxpayer, and which shall be answered under oath, require him to state: "Were you on the 15th day of September of the present year executor of a will, or administrator or curator of the estate of any deceased person, or guardian, committee, assignee, commissioner, receiver, or trustee, of any person; or have you in your possession or under your control any property, money, or other thing of value, belonging to any person or corporation?" And, if the answer is in the affirmative, the person is required to list such property separate from his own, and in the name of the real owner, and show by whom listed. It will thus be seen that there is nothing in the Constitution that interferes with the right to tax the property owned by appellants; and that the Legislature by its enactments has expressly provided that it shall be taxed. Therefore, if this property escapes taxation, warrant for so holding must be found outside of the letter of the Constitution and the statutes enacted in pursuance thereof. If property sought to be taxed is in the possession of a resident trustee, it enjoys the benefit of the protection of the laws of the State, and the cities where it is situated; and, as taxation and protection are said to go hand in hand, and be reciprocal obligations, it should bear its proportionate share of the burdens of government, unless some sound reason can be found to exempt it from these obligations.

In view of the importance of the question involved,

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and the argument that the judgment of the lower court is in conflict with the decisions of this court, and not in harmony with the current of authority bearing on the question, we will proceed to examine with some care the cases relied on pointing out the difference between them and the one at bar; but, before doing so, wish to observe that it is important to keep in mind the fact that it is the contention of appellants that this property is not subject to taxation for either State, county, or municipal purposes at any place in this State, that it is exempt from and beyond the reach of all our tax laws, and cannot be required to contribute anything to the support of any of the jurisdictions whose protection it enjoys. In City of Lexington v. Fishback's Trustee, 60 S. W. 727, 22 Ky. Law Rep. 727, 109 Ky. 770, the trustee resided in Fayette county, Ky., the beneficiary in Jefferson county, Ky., and the question before the court, was whether personal property held by a trustee was taxable at the residence of the trustee or of the beneficiary, and the court held it was taxable at the residence of the beneficiary. In Harting, Ex'r, v. City of Lexington, 43 S. W. 415, 19 Ky. Law Rep. 1829, William Harting devised all of his estate to his widow, Jane Harting, for life, and appointed H. F. Hillenmeyer executor of the will. Hillenmeyer lived outside the corporate limits of the city of Lexington, whilst Mrs. Harting lived in the city. The question to be determined was whether the estate held by Mrs. Harting for life should be taxed at her residence or that of Hillenmeyer, and it was held that as the widow was entitled to the use and benefit of the estate during her life, and the law required the life tenant to pay the taxes upon the estate so held, the situs of the intangible personal property was at the place of Mrs.

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Harting's residence, and not that of the executor. In Board of Councilmen v. Fidelity Trust & Safety Vault Co., 64 S. W. 470, 23 Ky. Law Rep. 908, 111 Ky. 667, the Frankfort Water Company, a domestic corporation, issued and sold its bonds which were made payable to Grant Green, as trustee, who resided in Frankfort. They were secured by a mortgage upon the property of the water company which was located in Franklin county, but partly within and partly without the city of Frankfort. The bonds were purchased by nonresidents of the State. The trustee never had any interest in, possession of, or control over the property covered by the mortgage, nor had he at any time in his own right or as trustee, or agent, or in any other capacity, the possession, ownership, or control of any of the bonds. In a proceeding by the city to tax these bonds, it was held that they were not liable to taxation; the opinion being rested upon the ground that the settled rule and policy in this State was to tax mortgaged real estate to the mortgagor at the place where it was situated, but the mortgage itself when in the possession of and owned and controlled by a nonresident of the State was not taxable here. In Commonwealth v. Bank of Commerce, 26 Ky. Law Rep. 407, 81 S. W. 679, 118 Ky. 547, and Deposit Bank of Owensboro v. Daviess County, 102 Ky. 214, 19 Ky. Law Rep. 248, 39 S. W. 1030, 44 L. R. A. 825, the banks for reasons fully stated in the opinion, and that in our judgment have no application to the question before us, were held not liable for taxation upon their deposits. In City of Louisville v. Sherley, 80 Ky. 71, 3 Ky. Law Rep. 566, the question before the court was whether the situs of intangible personal property for taxation was at the residence of the guardian or that of the infant wards; the guardian residing in the

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city of Louisville, and the wards in Jefferson county, outside of the city. In reaching the conclusion that the property should be taxed at the residence of the wards, the court said: "While the situs and control of the property may by law be made the test of its being subject to taxation in a particular locality, whether in the hands of the owner or the agent, still the mere fact that a guardian of infants lives within the municipality, while the infants are domiciled in another county or outside the city limits, will not subject their estate in the pockets of the guardian or the vaults of a city bank to taxation for municipal purposes. The safety and value of their estate is as well protected and preserved by the State government as that of the municipality into which it has been carried. They have not sought its protection or claimed its benefits, and were powerless to restrain the guardian from taking this property from the domicile of their father in Jefferson county to his domicile in the city of Louisville. This is not a case where the guardian is conducting a business for the infants, or investing money from nonresidents, nor is it a case where the representative is invested with title to the estate he represents, and, while the case of a personal representative or trustee might present stronger reasons for taxation, we do not determine that such representative would be liable, as the case is not before us." In this and other cases announcing the same doctrine it will be observed that both the fiduciary and the beneficial owner of the personal estate were residents of this State; and the only question presented was whether the property should be assessed for taxation at the residence of the fiduciary, or that of the cestui que trust. In the Sherley Case, which is the leading one upon this subject, and the others that have fol-

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lowed it, the court adopted the view that, as the property was situated within the State, it was merely a question of construction as to where it should be taxed; and the court, whilst recognizing that the statute might require the fiduciary to list the property, ruled that the taxes should be paid as at the place of the owner. Thus, in the Fishback Case, it is said: "The statute requires that every executor, administrator, guardian, or trustee is required to list property held by him in such capacity separate from his own, and in the name of the real owner, and shown by whom listed. This section is cited by appellant to show that such property is taxable at the residence of the fiduciary, as it seems to require the listing to be at his residence. But, if regarded in this light, it proves too much, for that construction would also make the property of a ward listable and taxable at the residence of the guardian, which this court in the Sherley Case has held was not the law. But we think the requirement is only to prevent property from escaping taxation by reason of the fiudciary and beneficiary having different residences, and to that end is a requirement that the fiduciary shall in the county of his own residence answer the question as to what property, if any, he holds in such capacity, and shall list the property so held by him separate from his own, in the name of the real or beneficial owner, at the place where such property is properly taxable."

It was not sought in these cases to exempt entirely the property from taxation, the only question being the place at which it should be taxed, and the court saw proper to give the statute such a construction as would subject the property to taxation at the residence of the beneficial owner, and this rule of construction has been followed in this class of cases for

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so long a time that it has become firmly fixed as part of the fiscal laws of the State, and will not now be disturbed. But the Legislature has left no room for construction as to the situs for taxation of the property sought to be taxed in the cases before us. It has as we have seen in the statutes supra distinctly given a situs to this class of property at the residence of the trustee; and, as the beneficial owner is a nonresident, it follows that the property must be taxed at the residence of the trustee, or not at all. It has never been held that personal property having an actual situs in this State should be exempt from taxation at any place in the State. Thus, in Baldwin v. Shine, 84 Ky. 502, 2 S. W. 164, 8 Ky. Law Rep. 496, personal assets, such as notes and bonds, in the hands of a personal representative who qualified here as administrator of a nonresident decedent, was required to pay taxes upon the assets in his hands. The argument was made that the assets, being mere evidences of indebtedness, had no actual situs, and must be treated as constructively located with the owners and at their domicile in another State, but, after citing the statute, this court said: "It is manifest from these statutory provisions that it was not intended that property should escape taxation by the government which protects it. The word 'owner' in the statute refers to the person in whom the title is vested, either absolute or qualified. Here the estate was taken in charge by the Kentucky administrator. The legal title was in him. The estate followed him and was annexed to his person, thereby having an actual situs in this State by the law of which it was protected. Moreover, it was under the charge of, and had to be distributed through, a court of this State." In Johnson, Sheriff, v. Bradley-Watkins Tie Co., 85

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S. W. 726, 27 Ky. Law Rep. 540, 120 Ky. 136, it is said that the enactment of the statutes heretofore quoted show "the Legislature had in mind the situs of personal property for taxation, and that they determined that personal estate situated in this State, whether belonging to nonresidents or residents, should be liable for taxation, and that personal estate of persons residing in this State should be liable for taxation whether the property be in or out of the State. There is no rule of fiscal law better settled than that it is within the power of a State to tax all property of which it has jurisdiction, whether the owner reside in the State or is a nonresident; that whether such property is taxable or not is a question of legislative intent, and when the intent to tax is clear, the power to do so is unquestionable." There is, of course, a marked distinction between what is known as corporal personal property, such as live stock, lumber, or other material, and intangible personal property, like notes, bonds, and other securities. And it is generally recognized that tangible personal property has an actual situs at the place where it is located without respect to the domicile of the owner, whereas the situs of intangible personal property for purposes of taxation depends altogether on legislative enactment, or judicial construction. It does not always follow the beneficial owner; but may be taxed at the place where the person resides who has the control and management of the securities, who lends out the money, collects the interest, and exercises other acts of ownership and control over it, and where it may be said to be permanently located, as much so as if the actual owner resided where it was. For many purposes the domicile of the owner is deemed the situs of his personal property, but this is only a fiction

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from motives of convenience, and is not of universal application, but yields to the actual situs of the property when justice requires that it should, and is not allowed to be a controlling feature in matters of taxation. Bristol v. Washington County, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. Ed. 701; New Orleans v. Stemple, 175 U. S. 309, 20 Supp. Ct. 110, 44 L. Ed. 174; City of Detroit v. Lewis, 109 Mich. 155, 66 N. W. 958, 32 L. R. A. 439; Price, etc., v. Hunter, etc. (C. C.) 34 Fed. 355; Finch v. County of York, 19 Neb. 50, 26 N. W. 589, 56 Am. Rep. 741; Redmond v. Rutherford, 87 N. C. 122; In re Jefferson, 35 Minn. 215, 28 N. W. 256; Catlin v. Hull, 21 Vt. 152; Tazewell v. Davenport, 40 Ill. 197.

We therefore conclude that under the statute notes, bonds, and other securities owned by nonresidents, but in the hands of a resident fiduciary or agent, for the purpose of controlling, managing, and investing, are taxable at the place of his residence. This rule rests upon the ground that the property in the hands of such fiduciary enjoys the protection of the law of the place where he resides, and he is enabled through and under them to protect the property in his care; and such securities should bear their just proportion of the burden of government. With the wisdom or policy of this law we are not concerned. That is a matter to be addressed to the legislative department of the government. It is sufficient for us to know that the legislature has seen proper to provide for the assessment and taxation of this species of property, and to fix its situs for this purpose.

The argument that the imposition of this tax may impose double taxation upon the owner, and thus result in great injustice, as he may be required to list his property at the place of his residence, is entitled

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to some consideration, but it cannot be allowed to overthrow or evade the plain provisions of our laws. It is impossible to enact tax laws that will operate equally and justly upon all species of property. The most that can be done is to make them as equitable as practicable, and each State must determine for itself the wisdom and propriety of its own tax laws.

Wherefore the judgments are affirmed.

CASE 29.—ACTION BY MATTIE THOMPSON AGAINST J. C. B. SEBREE FOR SLANDER.—June 19.

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Sebree v. Thompson.

Appeal from Scott Circuit Court.

R. L. STOUT, Circuit Judge.

Judgment for plaintiff, defendant appeals.—Reversed.

1. Slander—Absolute Privilege—Judicial Proceedings.—A witness while testifying under oath in a court of justice is not subject to prosecution for slander for any statement that he may make upon the subject under consideration.
2. Same—Question of Law.—Whether words otherwise actionable as defamatory are privileged is a question of law for the decision of the court, depending upon the circumstances of their utterance or publication.

J. C. B. SEBREE for appellant.

AUTHORITIES CITED.

Morgan v. Booth, 13 Bush, 480; Louisville Printing Co. v. Tenelly, 105 Ky., 365; Stewart v. Hall, etc., 83 Ky., —; Tygret v.

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Potter & Co., 97 Ky., 54; Rue v. Dale, 107 Ill., 275; Fourth Kent. Star, p. 144.

V. F. BRADLEY & SON and FINNELL & FINNELL for appellee.

AUTHORITIES CITED.

Am. & Eng. Ency. of Law, vol. 18, 2d ed., p. 1026; 6 Am. State Rep., 821; 104 Ky., 695; 13 Bush, 482; 93 Ky., 424; 24 Ky. Law Rep., 1904.

OPINION OF THE COURT BY JUDGE LASSING—Reversing.

Appellees, Mattie Thompson and husband, Frank Thompson, instituted an equity suit in the Scott circuit court against appellant, J. C. B. Sebree, wherein they sought to have a deed, absolute on its face, adjudged to be a mortgage, and also to have certain questions of account between themselves and appellant settled and adjusted. During the preparation of this equity suit for trial, and after the appellees had both testified, appellant was called and testified for himself as a witness in said case. During the progress of his testimony he made of and concerning the appellees the following statement: "The allegation in the plaintiff's petition that there was a contract between the plaintiffs and the defendant made at the time of the execution or delivery of it (the deed) or as part of it is untrue, and known to the plaintiffs (Thompson and wife) to be untrue at the time they made the statement and swore to the petition." Also the following: "The allegation in the petition of plaintiffs that the deed executed by the plaintiffs was intended to be a mortgage to secure $1,215 or any other sum, is false, and known to both the plaintiffs, at the time they swore to that petition, to be false." Also the follow-

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ing: "The statement that plaintiffs tendered the defendant any money or stated to defendant that they were ready to settle with him, and that there was an open account between plaintiffs and defendant for board, or anything, is false, and known to them to be false at the time they were sworn to the petition." Also the following: "The idea of his going there pursuant to any contract with plaintiffs or either of them made in January, or any other time, is absolutely false, and known by plaintiffs to be false at the time they so swore." Also the following: "The plaintiff's statement that they fed that cow a stalk of fodder of their own, or bought any, or anything else, is absolutely false and untrue, and known to them to be untrue at the time they so swore." Thereafter Mattie Thompson filed suit in the Scott circuit court against J. C. B. Sebree, seeking to recover from him the sum of $5,000 because of the speaking of the words above given of and concerning her, alleging that each and all of the statements were slanderous, and were made for the purpose of injuring her good name and reputation. The defendant admitted the speaking of the words, and alleged that they were true or substantially true, and for further defense pleaded that the statements were made and the words spoken by him while he was giving his deposition in a legal proceeding between himself and plaintiff after he had been sworn; that the matter about which he was testifying and concerning which he made the alleged slanderous statements was fully set out in plaintiff's pleading, and that his answers were responsive and pertinent to the questions at issue in the equity suit between himself and plaintiff's; that he believed that his answers were material and necessary to his defense; and that they were made for the purpose of

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presenting his defense, and without any desire or intention to injure plaintiff or her character in any way. The material allegations of the answer were traversed in the reply. On the issue thus joined, the case was submitted to a jury, who returned a verdict in favor of plaintiff for $1,000. Because of certain alleged errors during the progress of the trial, the defendant, Sebree, prosecutes this appeal.

The only question which we deem it necessary to determine is: Were the words spoken by appellant actionable, or, rather, was the occasion upon which these words were spoken what is known as a 'privileged occasion"? The rule is well settled that in actions for libel or slander the defendant is permitted to show, if he can, that the circumstances under which the words charged were spoken were such as to protect him from liability for what would otherwise be an actionable wrong. There are occasions when for the public good and in the interests of society one is freed from liability that would otherwise be imposed upon him by reason of the publication of defamatory matter, and these occasions are called "privileged occasions." Such occasions are divided into two classes by the text-writers: Those known as "absolutely privileged," and those "conditionally privileged." Words spoken upon an occasion "absolutely privileged though spoken falsely, knowingly, and with express malice, impose no liability for damages in an action for slander or libel, while, on the other hand, words spoken upon an occasion only "conditionally privileged" impose such liability if spoken maliciously or not in good faith; the difference between the two being that in the former case the freedom from liability is absolute and without condition, while in the latter case it is made to depend upon the absence

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of express malice. The decisions of courts of last resort, while in perfect harmony and accord as to these two classifications, vary materially in the arranging and grouping of the occasions that may be termed "absolutely privileged" and those "conditionally privileged;" some courts holding that the proceedings in a court of justice are "absolutely privileged," while others hold that they are only conditionally so. In England all proceedings before a court of justice are held to be "absolutely privileged," and this rule applies alike to judges, litigants, their counsel and to witnesses. The English rule has been adopted and followed with approval in many of the state courts, while in many other state courts proceedings in a court of justice are held to be "privileged" only so far as they are applicable and pertinent to the subject of injury, and are therefore "conditionally privileged."

Our court has not passed upon this direct question, although in the case of Gaines v. Aetna Insurance Co., 104 Ky. 696, 20 Ky. Law Rep. 86, 47 S. W. 884, in passing upon the sufficiency of a petition wherein the plaintiff sought to recover of the defendant because of certain alleged libelous matter set up in an answer in a former suit between plaintiff and defendant, this court said that the alleged libelous matter was "privileged," although the party making such allegations acted in bad faith, and knew at the time they were made, and before, that they were false, and without color of truth or probability, and that they were made in order to defame, injure, and ruin the plaintiff about whom they were spoken; for, said the court: "The paragraph of the answer objected to as libelous was certainly pertinent and relevant to the defense presented by appellee to that action, and though the

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allegations be untrue and were known to be untrue when made, and also conceding that they were made with bad motives, still, for obvious grounds of public policy, no action will lie therefor. * * * We know of no court holding that a party is liable for damages caused by a vexatious and spurious defense, even though it be for delay merely, to just demand. If the defense be pertinent and relevant, and one permitted by law, a party has a right to make it, without subjecting himself to an action for libel if he fails to maintain it. This is 'absolutely privileged.'" The rule thus announced by this court is rather in support of the English doctrine, which holds that proceedings in a court of justice are "absolutely privileged," for the court said that in the presentation of such defense as he desired to make, even though made with the knowledge that it was false, and for the express purpose of injuring and defaming another, yet the pleader was protected by the "absolute privilege" of the occasion; the question of good faith not entering into the consideration at all, and the pleader being left to his own choice in the selection of language in which to clothe his thought. This rule is supported by the text-writers. Townsend on Slander & Libel, section 221, says: "Whatever one may allege in his pleading by way of defense to the charge brought against him, or by way of countercharge, counterclaim, or set-off, can never give a right of action for libel." And, although there is some authority to the contrary, continuing, the author says: "We believe the better and prevailing opinion to be that for any defamatory matter contained in a pleading in a court of civil jurisdiction no action for libel can be maintained." And this doctrine is supported by Odger in his work on Libel and Slander. In Cooley on Torts, section 251,

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the rule is thus stated: "Pertinent matter in pleadings, motions, affidavits, and other papers, in any judicial proceeding is absolutely privileged. though false and malicious, and, in determining whether matter is pertinent or not, the court will indulge in no strained, technical, or close construction to deprive the defendant of the protection of privilege." The same rule which applies to pleadings is applied to the privilege accorded witnesses in judicial proceedings; in fact, in some of the text-books the question of privilege is rather extended in favor of the witnesses, for, as said by Townsend: "The due administration of justice requires that a witness should speak according to his belief the truth, the whole truth, and nothing but the truth, without regard to the consequences; and he should be encouraged to do this by the consciousness that, except for any wilfully false statement, which is perjury, no matter that his testimony may, in fact, be untrue, or that loss to another ensues by reason of his testimony, no action for slander can be maintained against him. It is not simply a matter between individuals; it concerns the administration of justice. The witness speaks in the hearing and under the control of the court, is compelled to speak with no right to decide what is immaterial, and he should not be subject to the possibility of an action for his words." In Starkie on Slander, 242, it is said: "Witnesses, like jurors, appear in court in obedience to the authority of the law, and therefore may be considered, as well as jurors, to be acting in the discharge of a public duty; and, though convenience requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy in case of a combination of two or more to give false evidence, they are not responsible

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in a civil action for any reflections thrown out in delivering their testimony." Cooley on Constitutional Limitations (7th Ed.) p. 629, says: "Among the cases which are so absolutely privileged on reason of public policy that no inquiry into motives is permitted in an action for slander or libel is that of a witness giving evidence in the course of judicial proceedings. It is familiar law that no action will lie against him at the suit of a party aggrieved by his false testimony, even though malice be charged." The remedy for a dishonest witness is limited to the criminal prosecution for perjury.

In the case of Hunckel v. Voneiff, 69 Md. 179, 14 Atl. 500, 17 Atl. 1056, 9 Am. St. Rep. 413, Justice Miller, in a most thorough and exhaustive opinion, in which all the authorities of the English and American courts are reviewed, cites with approval the case of Munster v. Lamb, L. R. 11, Q. B. Div. 588, in the English Court of Appeals, in which the judges said: "Why should a witness be able to avail himself of his position in the box, and to make, without fear of civil consequences, a false statement, which, in many cases, is perjured, and which is malicious and affects the character of another? The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because, if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that, if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their

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duty. It must be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who, under a different rule, would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions." And, continuing, the court adopts with approval the rule of "absolute privilege," on the ground that a sound public policy demands that "it is of the greatest importance to the administration of justice that witnesses should go upon the stand with their minds absolutely free from apprehension, that they may subject themselves to an action for slander for what they may say in giving their testimony." The rule thus adopted by the Supreme Court of Maryland is, as we above said, the English rule, and is in harmony with the decisions of many state courts of last resort; and while, as we have heretofore stated, a contrary rule has been announced and followed in many of the states, yet we believe that under the English rule the ends of justice are more nearly subserved. In the case of Stewart v. Hall, etc., 83 Ky. 375, 7 Ky. L. R. 323, this court held: "That whether words otherwise actionable are privileged is a question of law for the decision of the court, depending upon the circumstances of their utterance or publication."

This being true, the court should not have submitted to the jury in this case the question as to whether or not the words used, and which are the basis of this litigation, were privileged, but upon demurrer to the petition should have determined this question. Appellee had alleged in her petition in the equity suit that she had made a certain contract with appellant; that he was indebted to her on account for board and other items set up in her petition. The appellant had answered, denying each and all of the allegations of

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appellee's petition. Appellee and her husband had both testified in the case, and their testimony had tended to support the allegations of her petition, and it was after appellant had been sworn as a witness, and while being examined as such, that he made the statements which are the basis of this litigation. Each answer shows for itself that it is responsive to some allegation of the petition, or some statement made by appellee during her examination as a witness. It is true appellant in testifying might have contented himself with a bare denial of the facts alleged in the petition, or of the statements made by appellee, but he was not confined in his testimony to so doing. He was left, as the text-writers all agree he should have been, free to express himself in language which to him seemed to appropriately respond to the allegation, or to refute the testimony of his adversary. He was testifying of and concerning transactions alleged to have taken place between himself and appellee. He was his own and only counsel. He was asking and answering the questions for himself as a witness, and it is readily seen that he was attempting to make his answer most positive and emphatic. He not only denied in terms the allegations and the statements, but he went further, and in each instance said that at the time the allegations were made and sworn to by appellee she knew them to be untrue and false. If they were false, they being transactions between himself and appellee, we cannot escape the conclusion that she must have known they were false; and, without passing upon that question, if he believed that she did know they were false when she made and swore to the allegations in her pleading, or when she testified to facts, under oath, tending to support them, he had the right to believe that it was not only

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pertinent, but material, for him to so state, and, even under the modified rule, as adopted by those states which hold that proceedings in a court of justice are privileged only when they are pertinent and relevant, appellant was entitled to the protection of privilege. Mr. Cooley on Torts, p. 427, quoting from Chief Justice Shaw, says: "In determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a case in court, and a much larger allowance made for the ardent and excited feelings with which a party or counsel who naturally and almost necessarily identifies himself with his client may become animated by constantly regarding one side only of an interesting and animated controversy, in which the dearest rights of such party may become involved. And if these feelings sometimes manifest themselves in strong invectives, or exaggerated expressions, beyond what the occasion would strictly justify, it is to be recollected that this is said to a judge who hears both sides, in whose mind the exaggerated statements may be at once controlled and met by evidence and argument of a contrary tendency from the other party, and who, from the impartiality of his position, will naturally give to an exaggerated assertion, not warranted by the ocassion, no more weight than it deserves. Still this privilege must be restrained by some limit, and we consider that limit to be this: That a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness, or third person, which have no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to

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allow counsel full freedom of speech in conducting the cases and advocating and sustaining the rights of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions."

The same rule of law that would protect an attorney in the presentation of his client's case to a court or jury applies with equal, if not greater, force to the protection of a witness when testifying under oath, and there is as much, if not more, reason for the rule in a case like the one at bar, where the party testifying is at once counsel, client, and witness. He confined himself strictly to a consideration of the questions involved in the allegations. The complaint made by appellee is not that he wandered from the subject, but that he expressed himself in terms more forcible than he had a right to do. To this conclusion we cannot agree. She had said that the statements and allegations in her pleadings, and as given in her testimony, were true. He said that they were not true, and that from the very nature of the transactions she must have of necessity known that they were not true when she so stated and swore. Even though these statements had been made by appellant maliciously, yet, if when he made them he believed them to be true, it cannot be said that they are neither relevant nor pertinent, and hence under no rule of procedure in force in any of the courts could he be held to be answerable therefor, much less under the rule which appears to us to be most equitable and just, as tending to secure the best interests of society and to serve the ends of justice, to-wit, that a witness while testifying under oath in a court of justice is not subject to prosecution for libel or slander for any statement that he may make upon the subject under con-

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sideration. The case of Morgan v. Booth, 76 Ky. 482, relied upon by appellee, is not applicable to the case at bar, for the reason that the party in that case, who was charged with having uttered the slanderous words, was at the time of their utterance not testifying, but they were injected into the trial while another witness was upon the stand, and were in reference to the testimony which the said witness was then giving, and hence were, of course, not privileged under either rule.

The trial court should have sustained the demurrer to the petition. The cause is reversed and remanded, with instructions so to do.

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CASE 30.—ACTION BY THE CITY OF COVINGTON AND THE KIRCHNER CONSTRUCTION CO. AGAINST JAMES W. BULLOCK AND ANOHER FOR THE COST OF A STREET IMPROVEMENT.—June 20.

City of Covington, etc., v. Bullock, etc.

Appeal from Kenton Circuit Court.

M. L. HARBESON, Circuit Judge.

From the judgment the City and the Construction Company appeal.—Affirmed.

Municipal Corporations—Street Improvements—Paved Streets—"Reconstruction"—"Repair."—Where, after a street which had been paved with asphalt at the expense of abutting owners had fallen into disrepair, the city passed an ordinance directing that it be reconstructed with asphalt pavement in accordance with the ordinance, in so far as it related to resurfacing streets with asphalt paving, so that the entire improvement consisted merely of relaying a new three-inch asphalt surface on the original macadam base, without disturbing the same, the work did not constitute a reconstruction of the street, but was a mere repair thereof, for which the city was solely responsible.

F. J. HANLON, City Solicitor, for appellant city.

AUTHORITIES CITED.

1. The work was one of construction and not one of repairs: People v. The City of Buffalo, 65 N. Y. Supp., 163 (affirmed in 52 N. Y., 157; Smith on Modern Law of Municipalities, vol. 2, sec. 1316.

2. Authority of city to make the improvement in controversy: Ky. Stats., secs. 3094, 3096; Maddux v. City of Newport, 12 Ky. Law Rep., 658; Levi v. Coyne, 22 Ky. Law Rep., 493.

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GALVIN & GALVIN and ORIE S. WARE for appellant Construction Co.

AUTHORITIES CITED.

Ky. Stats., sec. 3094, 3096; Levi v. Coyne, 22 Ky. Law Rep., 493; People v. City of Buffalo, 65 N. Y. Supp., 163; 52 N. Y. App., 157 Louisville v. Nevin, 10 Bush, 550; Louisville v. Leatherman, 99 Ky., 213-216; Gosnel v. Louisville, 104 Ky., 212; Louisville v. Bitzer, 24 Ky. Law Rep., 2263.

S. D. ROUSE for appellees.

POINTS AND AUTHORITIES.

The work done in the city of Covington on the street in question is "repair" work and not "reconstruction": Ky. Stats., sec. 3096; Levi v. Coyne, 22 Ky. Law Rep., 493; People v. City of Buffalo, 65 N. Y. Supp., 163; Robertson v. Omaha, 55 Neb., 718; City of Henderson v. Lambert, 14 Bush, 10; City of Louisville v. Taylor, 23 Ky. Law Rep., 538.

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

Scott street is one of the principal thoroughfares in the city of Covington. Some 10 or 12 years ago the old macadam was taken up and the street was recurbed. A concrete base six and a half inches deep was laid, and this was surfaced with three inches of asphalt, making what is known as an "asphalt street." This asphalt street was kept in repair at first by the construction company and later by the city of Covington, until in 1906, when the asphalt had become much rotten and worn, the council ordered it removed and replaced by a new coating of asphalt three inches thick. The ordinance directing this work is as follows:

Section 1. Be it ordained by the General Council of Covington: Two-thirds of the members thereof con-

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curring, that Scott street from the south side of Fourth street to the south side of Fifth street, be, and the same is hereby, ordered to be reconstructed with asphalt paving in accordance with the specifications contained in the general ordinance for making same passed by the General Council and approved by the Mayor, May 22, 1906, and the amendment thereto; in so far as said ordinance relates to resurfacing streets with asphalt paving. The resurfacing with asphalt paving hereby ordered to be done shall be the portion of the street used as a roadway between the faces of the curb.

"Section 2. Said reconstruction shall be done one-half at the cost of the City and one-half at the cost and expense of the owner or owners of the lots and parts of lots fronting and abutting on said reconstruction between said points, and upon the completion of same the cost and expense of same shall be ascertained and one-half of it levied and assessed and apportioned upon and against said lots and parts of lots and the owners thereof according to the front and abutting feet of ground, and in accordance with the provisions of the City Charter of Covington.

"Section 3. Be it further ordained that the city civil engineer be and he is hereby authorized to advertise for sealed proposals for doing said work and furnishing the material therefor to be held before Council at a regular meeting thereof; Council hereby reserving the right to reject any or all bids.

"Section 4. This ordinance shall take effect and be in force from and after its passage and approval by the Mayor, and so much of any ordinance heretofore passed by the General Council as conflicts herewith shall be and the same is hereby repealed."

The contract for this work was let to appellant The

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Kirchner Construction Company, and, as appears from the record, the work was done strictly in accordance with the terms of the contract and ordinance. Certain of the property owners objected to being taxed for this improvement, upon the ground that the work done, although called in the ordinance "reconstruction," was in fact "repairs," and that they were not liable therefor, but that the whole cost of said improvement should properly be borne by the City. Upon a trial in the lower court is was held that the property owners were not liable, and that the improvement was in fact but a repair of the old asphalt street, and that the City alone was liable for this cost, the provisions of the ordinance to the contrary notwithstanding. From so much of the judgment of the lower court as holds the City liable for more than one-half of the cost the city appeals, and from that part of the judgment which releases the abutting property owners from liability the Construction Company appeals.

The sole question for determination is, was this work in fact a "reconstruction," or was it simply a "repairing" of the street? In the case of Levi v. Coyne, 57 S. W. 790, 22 Ky. Law Rep. 493, this court approved Webster's definition of the word "repair," and also of the word "reconstruction," as follows: "Webster defines 'repair' to restore to a sound or good state after decay, injury, dilapidation, or partial destruction, as to repair a house, a wall, or a ship. He defines 'reconstruction' to construct again, to rebuild." Under this definition, if the improvement consists in merely restoring the street to a good, serviceable condition by replacing such parts as are destroyed, the work is in fact but "repairing," no matter how extensive this work may be. If, on the

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other hand, the entire street is torn up and rebuilt, or built over again, the work is "reconstruction." The difference is well illustrated by counsel for appellee in the case of a roof over a building that is found to be in a dilapidated condition. The roof may be repaired by simply patching some holes, or the old shingles may be removed and new ones put in their place, so that it is an entirely new roof, and yet it is but a repair to the house. The fact that the covering has become worn or decayed so as to necessitate its being replaced, cannot be regarded as a "reconstruction" of the street. It is but a resurfacing, a repairing. "Construct" means to build; "reconstruct" means to rebuild, to build over again; and a street is not "reconstructed" by being resurfaced either in whole or in part. The cost of construction is necessarily large—a heavy burden upon the abutting property owners. This burden is placed upon them in the construction of streets because, theoretically, it is supposed to benefit and materially enhance the value of their property. The same may be said of reconstruction; but inasmuch as the abutting property has been made to bear this burden, and will hereafter be made to bear it whenever it becomes necessary to reconstruct the street, the owner is entitled to have the statute strictly construed, so as to impose upon him no greater burden than the law contemplates.

In the case before us the entire foundation of the street was left intact. Two-thirds and more of its depth remained. The curbing remained unaltered, the principal part of the street, so far as the cost and work of construction is concerned, was not disturbed by the work done under the ordinance in question. It can hardly be said that a street is reconstructed when

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more than two-thirds of the old work is left intact, and the new work consists in merely removing some decayed and worn material from the surface of the street and replacing it with new material. The question before us is much simplified if we take into consideration the repair or maintenance of streets where the driveway is made of stone. As is well known, the stone is constantly worn away, and it is necessary, at stated intervals, to resurface the entire street with new crushed or broken stone, and, where holes have worn into the street, these have to be filled. Now, when this street was originally macadamized, the cost thereof was borne in part by the abutting property owners; but it would hardly be contended that, when it became necessary to cover the entire street with a new coating of crushed or broken stone, the street was reconstructed. The only difference between a driveway made of crushed stone and one made of asphalt is that the latter is much more expensive, and is supposed to be much more durable. The same principle which would govern the maintenance of one would likewise govern the maintenance of the other. There is no statute which imposes a different liability upon property holders resident upon a street which has been laid in asphalt from those resident upon streets constructed with other material.

Counsel for appellant cites the case of People v. City of Buffalo, 65 N. Y. Supp. 163, 52 App. Div. 157, as supporting the contention of the City that this work was in fact "reconstruction," and not "repair;" but an examination of that case shows that it turned upon the construction of a statute materially different from the statute under which streets are built and repaired in cities of the second class in this State. The same is true of the case of Robertson v. City of Omaha, 55

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Neb. 718, 76 N. W. 442, 44 L. R. A. 534, cited and relied upon. In the case of Levi v. Coyne, 57 S. W. 790, 22 Ky. Law Rep. 483, the entire street was remade. The grade was changed, and the taxpayers sought to escape liability on the ground that some of the old material taken up out of the old street was used in relaying the street. The contention was not made in that case that the street was not "reconstructed," for the proof shows that it was; but the court held that the fact that some of the old material was used in reconstructing the street would not relieve the property owner from bearing his share of the burden of the cost of reconstruction. So in the case before us, if the entire street had been torn up, and the concrete foundation had been pulverized and used over again in relaying a new concrete foundation, the property holder could not escape liability on that account, as it is immaterial where the material comes from that is used in the reconstruction. If the fact is established that it is a reconstruction, then the abutting property holders are liable for their share of the cost. It is to be supposed that, if part of the old material is used in the reconstruction, the cost thereof is lessened by reason of this fact to some extent, just as in the rebuilding of a house, if the contractor is permitted to use some of the old material, the contract price is lessened to the extent of the value of the old material so used.

The question which is at last presented for determination in each particular case is this: Is the improvement a "repair," or is it a "reconstruction?" If the old skeleton or framework of the original structure is retained, and the worn parts are replaced with new material of the same or kindred sort, it comes clearly within the definition of "repair." If, on the

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other hand, the old structure is torn away, and a new one erected in place thereof, even though on the same general plan, then it is clearly a "reconstruction;" and it is immaterial that a part of the material taken out of the old structure is put into the new. These definitions of the words "repair and "reconstruction" apply with equal force and aptitude to all trades alike, and to all work alike, and have no different meaning when applied to "repair" or "reconstruction" of a house to that which they have when applied to the "repair" or "reconstruction" of a street. In the case before us the work done, though termed "reconstruction," was in fact but the "repair" of the surface of the old street.

The judgment of the lower court is affirmed as to both the original and cross appeal.

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CASE 31.—MANDAMUS ON PETITION OF ELEANOR BELKNAP AGAINST R. J. TILFORD, BUILDING INSPECTOR CITY OF LOUISVILLE.—June 20.

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Tilford, Building Inspector, v. Belknap

Appeal from Jefferson Circuit Court.

(C. P. Branch, 3 Div.) MATT O'DOHERTY, Judge.

Judgment for plaintiff, defendant appeals.—Affirmed.

1. Municipal Corporations—Police Power—Fire Ordinance.—The police power of a municipality to enact ordinances for the safety of the public, etc., includes the right to enact reasonable ordinances, rules and regulations to prevent the spread of fires and for the protection of property within the corporate limits.
2. Same—Delegation of Governmental Power.—A municipal ordinance providing that no frame building shall be erected, moved or remodeled within the city until the owner, architect or agent shall have obtained permission in writing from all parties owning permanent brick or stone structures within a radius of sixty feet of the proposed structure, was unconstitutional, as a delegation of governmental power to private citizens.
3. Constitutional Law—Municipal Ordinances—Due Process of Law—Equal Protection of Law.—Such ordinance was also unconstitutional as depriving the owners of frame structures of the equal protection of the laws and of their property without due process of law.
4. Municipal Corporations—Ordinances—Reosanableness.—A municipal ordinance prohibiting the erection, removal or remodeling of a frame building within sixty feet of a brick or stone structure without the consent of the owner of the latter was void for unreasonableness.

WARWICK MILLER for appellant.

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1. Our contention is that by Sec. 2783, Ky. Stats, the council of the city of Louisville has power to pass for the government of the city any ordinance not in conflict with the Constitution of the United States or of this State or the statutes thereof. Under the authority of said Sec. 2873 the ordinance in question was passed and appellee admits it comes under the police power, and if it comes under the police power it is not taking property without due process of law.

2. Under the exercise of power by the legislature private comfort and interest must yield to the public welfare. The use of property may be so regulated as to insure public safety. Every owner takes property subject to this condition.

AUTHORITIES CITED.

Hydes v. Joyce, 4 Bush, 464; Franke v. Paducah Water Company, 88 Ky., 467; Lowery v. City of Lexington, 75 S. W., 202; Louisville v. Public Library Co. and City 26 R. 202, Gundberg v. Chicago, 177 U. S., 183; Arms v. Ayers, 58 L. R. A., 277; McQuillan on Municipal Ordinances, sec. 89; Smith's Modern Law of Municipal Corporations, sec. 1321: City of Eureka v. Wilson, son, 48 Pac. Rep., 43; Commissioners at Easton v. Mann, 12 L. R. 48 Pac. Rep., 43; Commissioners at Easton v. Covey 74 Md. 262, City of Olympia v. Mann, 12 L. R. A., 150; Brock v. Commonwealth, Ky. Stats., sec. 2783; L'Hote v. New Orleans, 20 Sup. Court Rep. 788; First Dilon Municipal Corporations, 4th ed., sec. 141; Power v. Pa., 127 U. S., 678.

C. B. BLAKELY for appellee.

HUMPHREY, HINES & HUMPHREY of counsel.

1. It is contended by appellee that the ordinance in question is invalid for the reason that it is a delegation to a private citizen to exercise a power which alone the city has authority to exercise. A municipal corporation cannot delegate its police power to a private individual.

2. The ordinance applies to the outskirts of the city where frame buildings predominate, and for that reason, if for no other, it is unreasonable and void.

3. The ordinance is in violation of the Fourteenth Amendment to the Federal Constitution, providing that "no person shall be deprived of his property without due process of law;" and that "all persons are entitled to the equal protection of the law."

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AUTHORITIES.

McQuillan on Municipal Corporations, secs. 84, 87; Frank v. Paducah, 88 Ky., 469; Hydes v. Joyce, 4 Bush, 464; Lowery v. City of Lexington, 75 S. W., 202; Boyd v. City of Frankfort, 77 S. W., 669; St. Louis v. Russell, 22 S. W., 470; St. Louis v. Howard, 24 S. W., 770; in re Quong Woo, 13 Fed Rep., 229.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This is an appeal from a judgment of the lower court compelling by mandamus the city of Louisville, through its board of safety and building inspector, to grant appellee permission to erect a frame dwelling upon her lot situated on a street of that city, known as "Longest avenue." The facts alleged in the petition sufficiently present the grounds upon which appellee based her right to the permit demanded of appellant's building inspector, and these facts, being confessed by the demurrer to the petition, and not denied by answer, are, upon this appeal, to be accepted as true. The facts are, in brief, as follows: Appellee wished to build a frame dwelling house on her lot, which lies in the outskirts of the city of Louisville, and adjoining that of Henry S. Gray, upon which is situated a brick dwelling house. An ordinance of the city required appellee, before beginning the erection of the house on her lot, to obtain of R. J. Tilford, its building inspector, a permit to build same. When she applied to the inspector for the permit, he refused to grant it upon the sole ground, that Gray, the owner of the adjoining lot containing the brick building, had refused to consent in writing or otherwise to the erection of a frame house on appellee's lot, as it would be within 60 feet of his brick house. Appellee had previously asked written permission of Gray to erect the house

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in question, which was refused. Her request to the inspector for the permit and his refusal of same were both in writing. The building inspector's refusal of the permit was based on section 6 of an ordinance of the city of Louisville. The section reads as follows: "No frame building shall be erected, moved or remodeled within the city of Louisville, until the owner, architect, or agent, of said building shall have obtained permission in writing from all parties owning permanent brick or stone structures within a radius of sixty feet of the proposed structure; for failure to comply with this section the owner, architect or builder, either or all of them, shall be subject to a fine of from five to twenty-five dollars per day for each day, until this section is complied with." The petition attacks this ordinance upon the ground that it is violative of the provisions of the State Constitution, because by it the city of Louisville attempts to delegate to the private citizen power over the property of another, which the city alone has authority to exercise, and is also violative of the provisions of the fourteenth amendment to the Constitution of the United States, which declares that no person shall be deprived of his property without due process of law, and that all persons are entitled to the equal protection of the law. The court below held the section supra unconstitutional and void, and in that ruling we fully concur. It goes without saying that in the exercise of its governmental functions, and under the police power, a municipality may enact ordinances for the safety of the public and the protection of its health and morals. This includes the right to establish by ordinance rules and regulations to prevent the spread of fires and for the protection of property within the corporate limits, but such rules

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and regulations must be reasonable, and their enforcement undertaken by the city in its corporate capacity, or, if this be not practicable, intrusted to such instrumentalities as it may lawfully create and clothe with the necessary power. The right of the municipality to place in the hands of boards and even single officers the enforcement of regulations for the health and safety of the public has frequently been sanctioned by legislative enactment and recognized by the courts. But such powers as these cannot be delegated to a private citizen as here attempted. In considering this subject McQuillan, in his work on Municipal Corporations (section 84) says: "Therefore the principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others. Contracts and ordinances relating to any municipal function which embarrass in any way the power of regulation of public affairs are ultra vires; for the municipal corporation cannot in any manner divest itself of its powers to control and regulate at all times everything within the domain of its jurisdiction." We are further told in the same work (section 87): "So an ordinance giving the property owners of a block the right to say whether a livery stable shall be located in such block —such power being imposed by charter upon the legislative body—is void. So an ordinance making it a misdemeanor to operate a slaughter-house within three hundred feet of a dwelling house, without the written consent of the occupant, is invalid, as attempting to substitute for the sanction of the law the written consent of one or more individuals. So, where the charter or law applicable commits to the legislative body of the corporation the exclusive

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authority to provide by ordinance, additional offices, situations, and places of employment, in the municipal service, and fix the compensation as in the legislative discretion the demands of the several offices or departments require, such power can not be delegated in whole or in part." The doctrine announced by McQuillan has frequently been approved by this court. Thus, in Frank v. Paducah, 88 Ky. 469, 11 Ky. Law Rep. 17, 11 S. W. 433, 718, 4 L. R. A. 265, it is said: "A delegation of power to one corporation or to one man in a city of determining who shall exercise a particular trade and to provide penalties for misconduct or neglect in the discharge of his duties is also in violation of the organic law of the State." This court held to the same doctrine in the following cases: Hydes v. Joyce, 4 Bush, 464, 96 Am. Dec. 311; Lowery v. City of Lexington, 75 S. W. 202, 116 Ky. 157, 25 Ky. Law Rep. 392. In St. Louis v. Russell, 22 S. W. 470, 116 Mo. 248, 20 L. R. A. 721, an ordinance very similar to the one under consideration was declared invalid. In the opinion it is said: "We are also of the opinion that the ordinance is invalid for the reasons that by its provisions one citizen is permitted to erect a livery stable in a certain locality by obtaining the written consent of the owners of one-half of the ground in the block, while another of like merit would not be permitted to do so for the want of such consent. It would enable one person to construct and operate a livery stable upon one side of the street by getting the written consent of the owners of one-half of the ground in the block, while another would be denied the privilege of erecting a similar building in the opposite block across the street, or in an adjoining block, because of his inability to obtain such consent. Not only this, if one

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person is fortunate enough to be the owner of one-half of the ground in the block, he can erect his stable with impunity, while his neighbor, or other person, not so fortunate, could not do so, the direct result of which would be to create a monopoly. The effect would be discrimination in favor of certain persons and against others entitled to equal rights before the law. This court has on different occasions held ordinances less obnoxious, unreasonable, and void." St. Louis v. Howard, 24 S. W. 770, 119 Mo. 41, 41 Am. St. Rep. 630.

The ordinance involved in the case at bar is both unreasonable and discriminatory, for it attempts to confer upon a private citizen who may be so fortunate as to own a stone or brick house power of the most arbitrary character over the property of his neighbors within a radius of 60 feet of his own house. This power is not allowed to the owner of a frame house, though his house would be in more danger from the erection of a frame house on the adjoining lot of his neighbor than would a brick or stone house. The owner of the stone or brick house is, in respect to the exercise of the power delegated by the ordinance, wholly uncontrolled. The only way the adjoining lot owner can interfere with his exercise of the power conferred is to build on his lot a brick or stone house; for in no other way can he avoid the necessity of having to ask the other's consent. This of itself practically amounts to coercion or duress. As said in the opinion of the learned circuit judge, "the citizen's right to apply his property to any lawful use is itself property, and is as such as clearly within the constitutional inhibition against assault or spoliation as the property to which it attaches and into which it may be said to enter as an integral part. True, the

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right to use one's property in a particular way may be limited by a reasonable police regulation, and its use in violation of such regulation is not a lawful use, and is therefore not a property right; but a regulation like that under consideration here, which does not vest a discretion in any tribunal, board, or officer of the law, but attempts to vest arbitrary and irresponsible power in the owner of every brick or stone building in the city over the property rights of his neighbor, is neither reasonable nor constitutional. No man is or ever should be made judge in his own case, yet this is what the section of the ordinance in question attempts to do. Such legislation, if it could be upheld by the courts, would only be a constant source of trouble and irritation among neighbors. A., the owner of a brick or stone house, could allow B., his favored neighbor, to build a frame house on the lot next adjoining his property on the north, and refuse a like privilege to C., owner of the lot adjoining his property on the south. The right of B. or C. if he have any under the law, cannot be thus made to depend on A's mere whim." This reasoning is sound and convincing. The ordinance complained of is open to every objection made to it. If under any circumstances the city of Louisville could confer on a private citizen any right to interfere with his neighbor in the erection of buildings upon his own property, it cannot be done as here attempted; for the ordinance is intended to confer, and actually does confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and mandatory power to give or withhold consent at the mere whim or according to the caprice of the custodian of the power. In brief, it is purely an arbitrary power, which acknowledges neither guidance nor restraint,

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and the exercise of which might in every instance result in oppression and unjust discrimination. Boyd v. City of Frankfort, 117 Ky. 199, 25 Ky. Law Rep. 1311, 77 S. W. 669, 111 Am. St. Rep. 240.

For these reasons, we do not hesitate to condemn the ordinance as unconstitutional and void. In our opinion the lower court did not err in overruling the demurrer to the petition, nor in granting the writ of mandamus.

Wherefore, the judgment is affirmed.

CASE 32.—ACTION BY JOHN E. SHEEGOG'S ADMINISTRATOR AGAINST THE ILLINOIS CENTRAL R. R. CO. FOR CAUSING THE DEATH OF PLAINTIFF'S INTESTATE.—June 20.

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Illinois Central Ry. Co. v. Sheegog's Admr.

Appeal from Union Circuit Court.

J. W. HENSON, Circuit Judge.

Judgment for plaintiff, defendant appeals.—Affirmed.

1. Master and Servant—Injuries to Servant—Actions—Evidence.—In an action against a railroad for the death of a locomotive engineer, evidence examined, and held to warrant the refusal of a peremptory instruction for the defendant.
2. Death—Punitive Damages—Grounds—Gross Negligence.—Under Const. Sec. 241, providing for a right of action for the death of a person caused by negligent or wrongful act, and the express provisions of Ky. Stats., 1903, c. 1, sec. 6, where a railroad was guilty of gross negligence in running a defectively equipped train over an unsafe track at a high rate of speed, it was proper to submit to the jury the question of punitive damages.

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3. Removal of Causes—Proceedings—Duty of Courts.—Where a petition is filed for the removal of a case to the Federal court, it is the duty of the judge of the State court to determine from the petition and record, whether or not there is presented a Federal case, and, if so, he should remove it to the Federal court, and that court should hear the proof on the jurisdictional facts, and determine whether the State or Federal court has jurisdiction.
4. Statutes—Pleading Private Acts.—Civ. Code Prac., Sec. 119, provides that, "in pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law." Held, that a petition for the removal of a case to the Federal court was defective, which did not state the title of a private statute, nor its contents, but merely the petitioner's conclusions as to its contents.
5. Railroads—Leases—Liability of Lessor.—Under Const. Sec 203, providing that no corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or lessee, contracted or incurred in the operation of the franchise, or any of its privileges, a railroad which had received a franchise from the State could not by a lease exempt itself from responsibility for the torts of itself and lessee.
6. Same—Liability of Lessor to Lessee's Servants.—While the lessor of a railroad is not liable to the employes of the lessee for torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased property, it is liable to them for an injury resulting from the negligent omission of a duty owed to the public, such as the proper construction of the road.

TRABUE, DOOLAN & COX for appellant.

J. M. DICKINSON, HENRY D. ALLEN and LOCKETT & LOCKETT of counsel.

POINTS AND AUTHORITIES.

1. No allegation of decedent's ignorance of alleged condition of the track is made, which renders the petition demurrable: Bogenschutz v. Smith, 84 Ky., 330; L. & N. R. R. Co. v. Mellott, 101 Ky., 215; Williams v. L. & N., 111 Ky., 825; Choctaw, etc., v. McDade, 191 U. S., 64.

2. A peremptory instruction should have been granted.

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Fencing not required, nor permitted at station: Ky. Stats., sec. 1792.

The mule was cause of collision and everything else remota causa, and not proxima causa: Louisville Gas Co. v. Kaufman & Straus, 105 Ky., 131; Hughes v. Railroad, 91 Ky., 531; Wintuska v. same, 14 Ky. Law Rep., 579; P., C., C. & St. L. Ry. Co. v. Lewis, 18 do., 957; Johnson v. E. T. V. & G., 18 do., 67; Nelling v. R. R. Co., 98 Iowa, 554; Coxe v. same, 102 Lowa, 711.

3. (a) Instruction second misleading in reference to roadbed and to rolling stock, and care to keep them in condition, the condition of roadbed and rolling stock not being proximate cause.

Also, erroneous in any reference to Durbin's duty.

(b) Erroneous in ignoring the relation between cause and effect permitting recovery for remote cause; and in ignoring causation.

(c) Sixth instruction, erroneous in referring to gross negligence: L. & N. R. R. Co. v. Creighton, 106 Ky., 42; 20 Ky. Law Rep., 1692; L. & N. R. R. Co. v. Taaffe's, 106 Ky., 535; 21 Ky. Law Rep., 64.

4. (a) Where fraudulent joinder is alleged and the facts alleged show a right of removal, the facts must be assumed true and the Federal court must try the issue: Dow v. Bradstreet, 46 Fed., 824; Arrowsmith v.N. & D. R. Co., 57 Fed., 165; Diday v. R. R. Co., 107 Fed., 565; Boatner v. Am. Ex. Co., 122 Fed., 714; Weaver v. Ry., 125 Fed., 155; Board v. Toronto Bank, 128 do., 167; Gustafson v. Co., 128 Fed., 85; Swann v. Mut. Res., 116 Fed., 232; Union Terminal v. C., B. & Q., 119 Fed., 209; I. C. R. R. v. Jones, 80 S. W., 484 (25 Ky. Law Rep., 31).

(b) An issue of fact involved in jurisdiction is triable in the Federal court alone: R. R. Co. v. Dunn, 122 U. S., 513, 517; R. R. v. Wangelin, 132 U. S., 599; Daughtry v. K. C., etc., 138 U. S., 298; I. C. R. R. Co. v. Jones, 26 Ky. Law Rep., 31; 80 S W., 484; see also cases cited supra.

(c) The good faith of the plaintiff in making untrue allegations can not avail him to defeat Federal jurisdiction: Diday v. Railroad, supra.

(d) Appellee's petition sufficiently indicates the purpose of the joinder of Durbin.

No cause for action is stated against Durbin: C., N. O. & T. P. R. R. v. Robinson, 25 Ky. Law Rep., 265; 74 S. W., 1061; Davis v. C., N. O. & T. P. R. R. v. Robinson, 25 Ky. Law Rep., 265; 116 Ky., 144; Gustafson v. Co., 128 Fed., 85; L. & P. Canal Co. v. Murphy, 9 Bush, 527; Swice's admr. v. M. & B. S. R. Co., 116 Ky., 253; Yeates v. I. C. R. R. Co., 139 Fed. Rep., 943; Axline v. Toledo, etc., Co., 138 Ibid., 169; See I. C. R. R. Co. v. Coley, Nov. 3, 1905.

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ADDITIONAL POINTS AND AUTHORITIES.

1. A case of negligence may exist where an instruction as to punitive damages would be erroneous, and the preliminary question is for the court: McHenry Coal Co. v. Sneddon, 98 Ky., 686; L. & N. R. R. Co. v. Creighton, 106 Ky., 42, 46; L. & N. R. R. Co. v. Taoffe's admr., Ibid., 535; Lexington, etc., Co. v. Fain, 25 Ky. Law Rep., 2243; Southern Ry. Co. v. Goddard (Nov. 29, 1905), 28 Ky. Law Rep.

2. Punitive damages admissible only when injury wanton or disregard of precaution for others' safety, wilful: McHenry, etc., Co. v. Sneddon, 98 Ky., 686; L. & N. R. R. Co. v. Kingman, 18 Ky. Law Rep., 83; Lexington, etc., Co. v. Fain, 25 Ky. Law Rep., 2243; Southern Ry. Co. v. Goddard (Nov. 29, 1905), 28 Ky. Law Rep., Milwaukee, etc., Co. v. Arms, 91 U. S., 495; Lake Shore, etc., Co. v. Prentiss, 147 U. S., 107; F. S. R. R. Co. v. Hirst, 30 Fla., 1; 32 Am. St. R., 33; 3 Sedow. Dam., 363; 1 Sutherland Dam., 724; 12 A. & E. En., 2d ed., 28.

HENDRICK & MILLER for appellee.

POINTS AND AUTHORITIES.

1. Because of the fact that a great "hue and cry" has been raised in courts and legal circles about the supposedly "unpardonable sin" of preferring the State courts over Federal courts and of exercising the right expressly provided by Sec. 241 of the Constitution of Kentucky, and Sec. 6, Ky. Stats., whereby an action may be brought for the negligent or wrongful killing of an individual against both the principal and the agent whose negligence or wrongful act caused the death, and because even the Court of Appeals of Kentucky has seemed to be influenced by this systematic and designed clamor to such an extent as to speak, in some of its decisions upon the subject, of "artful subterfuges resorted to by pleaders to control jurisdiction" and of "trifling with the court, etc.," we have thought it not out of place in this brief to call the court's attention to what might be called the ethics of the question, and to show not only that we are simply exercising our constitutional rights and discharging our duty to our clients, but that we are doing the same thing that lawyers and litigants have done in thousands of other instances in suing principal and agent together; as in such cases as Hawkins v. Riley, 17 B. Mon., 101; Baird v. Shipman, 132 Ill., 16 and 7 L. R. A., 128; Stephen v. Wilson, etc., 24 Ky. Law Rep., 1832; Dixon v. C. & O. Ry., 178 U. S.,

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131, and other cases too numeous to mention; and that as said by Chief Justice Fuller in the Dixon case, we are "performing a lawful act," and that our purpose in doing so cannot be inquired into, but on the other hand the whole doctrine that the corporation of another State has the right of removal on the ground of diversity of citizenship has no foundation in justice or common sense, and is the result of what Judge Thompson in his admirable work on Corporations denominates a "theft of jurisdiction;" Thompson on Corporation, vol. 6, p. 591; that the Supreme court of the United States, beginning with the opinion delivered by Chief Justice Marshall in the case of Bank v. Deveaux, 5 Cranch, 61, held and for six years continued to hold, that a corporation aggregate was not a citizen (Thomp. Cor., vol. 6, pp. 3909-10); that the idea grew out of the "habitual greed of jurisdiction" on the part of a certain character of judges and courts and the deliberate effort on the part of large railroad corporations "to defraud the courts of the various States and territories through which their road should lie" of jurisdiction, etc.; same work vol. 6, p. 5913; that the whole practice is an outrage upon litigants; that the perpetrators of fraud are as shown by the author cited, the corporation and parties who obstruct justice by dragging impecunious litigants, without right or reason, out of their home courts and vicinage to distant, and to them inaccessible tribunals; and that the charge of fraud against the lawyers and litigants who avail themselves of this constitutional right of joining the principal and agent in the same action, is not only unjust, but is a slander to which the courts should not lend a so willing and credent ear as some of them have seemed to lend. So much has been said about the fraud of joining an employe and the employer corporation as defendants, that the courts themselves have seemed almost to forget that is only the same thing which has been done, and which has been sanctioned, in a thousand other cases and situations from time immemorial; and we in behalf of simple justice ask a careful reading of this part of our brief. Thompson on Cor., vol. 6, pp. 5909-5910-5911-5913 and lastly 5949.

2. The cases cited by appellant to show this case removable, and holding a doctrine different from that heretofore announced by this court in the cases of I. C. R. R. Co. v. Jones, 26 Ky. Law Rep., 31; Rutherford v. I. C. R. R. Co., 27 Ky. Law Rep., 397, and other cases, are, none of them, authoritative, but are mainly decisions of district judges, many of them delivered prior to the decision of the Dixon case, but at last are decided upon the idea that the cases were removable upon an inspection of the face of the record.

3. "The State court must determine from the petition and rec-

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ord whether or not there was presented a removable case:" Rutherford v. I. C. R. R. Co., 27 Ky. Law Rep., 397; I. C. R. R. Co. v. Jones, 26 Ky. Law Rep., 31, and many other cases—and

"The State court is only at liberty to inquire whether on the face of the record a case has been made which requires it to proceed no further."

Crehore v. O. & M. R. R. Co., 131 U. S., 240 (32 L. ed., 144), and —"A State court is not bound to surrender its jurisdiction of the suit till a case has been made which on its face shows that the petitioner has a right to transfer." Crehore case, supra, Stone v. South Carolina, 117 U. S., 50 (29 L. ed., 672); Stevens v. Nichols, 130 U. S., 230; Phoenix Ins. Co. v. Pechneh, 95 U. S., 183, and many other Supreme court cases.

4. Plaintiff had a right to join both the corporation and the agent thereof through whom the negligent acts were committed as defendant; and there is no misjoinder and plaintiff's motive in performing this lawful act cannot be inquired into. Const. of Ky., sec. 241, Ky. Stats., sec. 6; C. & O. R. R. Co., Dixon, 179 U. S., 131, and the two cases of C., N. O. & T. P. Ry. v. Cook's admr. and A. G. S. Ry. Thompson, decided by the Supreme court January 2, 1906; I. C. R. R. Co. v. Jones, supra, and Rutherford case, supra.

5. If the jurisdictional facts are stated in the petition for removal the jurisdiction at once passes from the State to the Federal court. Kansas City R. R. Co. v. Daughtry, 138 U. S., 298; and these jurisdictional facts cannot be inquired into in the State court. The jurisdictional facts in a case like this are two: diversity of citizenship and the involvment of an amount in excess of $2,000. If the petition and record do not affirmatively show the existence of these two facts the Federal court acquires no jurisdiction to inquire into the truthfulness or untruthfulness of the pleading in any other respect. Jones case, supra; Rutherford case, supra, and Whitcomb v. Smithson, 175 U. S., 635; Howe v. N. P. Ry. Co., 60 L. R. A., 949; also the Crehore, Stevens, Stone and Dixon cases cited above.

6. If the case is tried on the merits before a jury and plaintiff insists upon his contention of joint liability to the last, the fact that a peremptory instruction be given for the citizen defendants, joined, does not warrant the court in removing the case even upon a supplemental petition and bond tendered by the remaining defendant. Whitcomb v. Smithson, 175 U. S., 635; Howe v. N. P. R. R. Co., 60 L. R. A., 949 (Wash).

7. A cause of action is stated in the petition against the co-defendant, Durbin, who was a citizen of Kentucky at the time the

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suit was filed. Chiles v. Drake, 2 Met., 146; 2 Ch. Pl., 650; Pierce's admr. v. I. C. R. R. Co., 27 Ky. Law Rep., 801.

8. A cause of action is stated against the Chicago, St. L. &N. O. R. R. Co., also a co-defendant, and a Kentucky corporation. The negligence charged against the lessor company being its negligence as to its track, fences and cattle guards, etc., the petition against it states a cause of action, as it owes the public, including the servants of the lessee, the duty of maintaining them, and cannot divest itself of this burden. McCabe's admr. v. M. & B. S. Ry., 112 Ky., 861.

The petition states that this defendant owns and controls the roadbed, etc., and this is not denied. The mere leasing, or the power to lease, does not mean the release of the lessor from liability—McCabe case, supra—and the terms of the lease are nowhere stated in the petition for removal nor in the answer of any defendant, and the lease itself is not filed and made affirmatively the right to remove; Stevens v. Nichols, 130 U. S., 230 (L. ed. 32, 914); Mansfield, etc., R. R. Co. v. Swan, 111 U. S., 379 (28 L. ed., 461); Mexican National R. R. Co. v. Davidson, 157 U. S., 201. The negligence complained of as against this defendant being not merely the negligence of the lessee, as to cars and appliances of the lessee under its control, but, being the negligence of the lessor in failing to maintain its track properly, the servant of the lessee has a right of action against the lessor. Swice v. M. & B. S. R. Co., 116 Ky., 253. This Swice case rests upon for its authority, and quotes as its principal authority the cases of Lee v. S. P. R. Co. (Cal.), 47 Pac., 932; 38 L. R. A., 71; 58 Am. St. Reps., 152, and the case of East Line ,etc., R. R. Co., Culbertson, 72 Tex., 375 (10 S. W., 706, 3 L. R. A., 567); 13 Am. St. Rep., 805, and these cases hold the very doctrine contended for here. In the Lee case the plaintiff was the servant of the lessee company and recovered of the lessor. See also Nugent v. Boston and M. R. Co., 80 Me., 62; Arrowsmith v. N. & D. R. Co., 57 Fed. Rep., 165; Ry. v. Curl, 28 Kansas, 622.

9. Civil Code of Kentucky and the decisions of this court permit servants of the lessee to sue lessee and lessor jointly upon same principle followed in I. C. R. R. Co. v. Jones; 26 Ky. Law Rep., 31; Kuhn v. Cen. Pas. Ry. Co., 86 Ky., 578; Rutherford v. I. C. R. R. Co., 27 Ky. Law Rep., 397, as in all these cases the respective defendants in each case bore different relationship to the defendant and were liable notwithstanding they owed different duties.

10. Failure of defendants to put cattle guards and maintain same at the termination of fences on each side of the track at public roads made them liable for killing caused hereby. Sec.

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1793, Ky. Stats., McKhee v. Kuyn, 98 Ky., 209; 17 Ky. Law Rep., 794; McGhee v. Gaines, 98 Ky., 182; 17 Ky. Law Rep., 748; and more particularly Parish v. L. & N. R. R. Co., 1524—78 S. W., 186; also sec. 466, Ky. Stats., giving this right of action, and Hayes v. Mich. Cen. R. R. Co., 11 U. S., 228 (L. ed., 28:510), which decides the exact point, and holds that even if the statute provides that it is for the safety of cattle, still, its violation is evidence of negligence in a personal injury action.

11. If a party except to a decision of a court in granting or refusing any instruction all the instructions given and refused shall also be included in the bill of exceptions. Civil Code, Sec. 337, Subsec. 2. The bill of exceptions in this case on its face shows that only a part of the instructions given are included and that it includes, of the refused instructions, only those offered by the defendant, and appellants in their brief actually quote verbatim an instruction, the first and most important given, which is not included in the bill of exceptions. This court can therefore consider no objections to instructions.

12. The judge of the lower court failed to certify that the bill of exceptions contained all the evidence as required by Sec. 339, Civil Code, and exceptions and objections to the evidence cannot therefore be considered by this court. Most of same cannot be considered for another reason; and that is, that the specific errors relied upon must be stated in the grounds for a new trial. Slater v. Sherman, 5 Bush, 206, also 13 B., 297; 14 B., 297; 7 B., 235; 9 Ky. Law Rep., 467, and Jones v. Woocher, 90 Ky., 230; but the court's rulings as to the evidence are nevertheless shown to be correct.

13. Appellant is incorrect in his contention as to law of punitive damages. Sec. 6, Ky. Stats. But, the evidence in this case would have sustained punitive damages even under appellant's contention. Still, the jury gave compensatory damages only—$8,250 for the life of an intelligent, healthy, robust, industrious, sober and studious young man, 28 years of age, making $130 to $150 per month, with an expectancy of 30 to 35 years and prospects for advancement and promotion increasing his earning capacity.

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

This action was instituted by the administrator of John E. Sheegog, who was killed in the derailment of an engine and train of cars of which he was engineer at the time. The Chicago, St. Louis & New

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Orleans Railroad Company, the owner and lessor of the road, Illinois Central Railroad Company, the lessee, and F. J. Durbin, the conductor in charge of the train, were made defendants to the action. It was alleged in the petition, in substance, that on the 7th day of May, 1903, his intestate was in the employment of the defendant, Illinois Central Railroad Company, as an engineer on one of its trains, and while in the performance of his duty, as such engineer, the train upon which he was engaged was, through the joint and gross negligence and carelessness of the three defendants herein, derailed, and his intestate thereby instantly killed. In the petition the negligence and concurrent negligence of each of the defendants is alleged with some particularity. We copy from it as follows: "At the time the defendant the Chicago, St. Louis & New Orleans Railroad Company was the owner of said roadbed, fences, right of way, trestles, and bridges where said accident happened, and the Illinois Central Railroad Company was the lessee of said railroad property and premises, and was the owner of the engines and cars, trains, and appliances by which the said intestate was killed, and was operating said road, trains, and engine, and the defendant F. J. Durbin, who is a citizen of Kentucky, was the conductor in the employment of the latter railroad company, and in charge of said train and engine and appliances, and the said intestate was required to obey, and was obeying and acting under, the orders of the said defendant F. J. Durbin. The plaintiff now says that, by the negligence of both of said companies, defendants hereto, the said roadbed, rails, track, cattle guards, ties, fence, and right of way of the said railroad was allowed to be, and for a long time had been, in a weak, rotten, ruinous, and

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defective and improper condition, and by the negligence of the Illinois Central Railroad Company its engines and cars were knowingly allowed to be and remain in an improper, defective, and dangerous condition, and its said engine and cars to be so constructed as to be in a dangerous condition, and this improper and dangerous condition of the said road, premises, and cars of the defendants was known to the said defendants, and at the time of this said wreck and accident, same were being operated in a careless manner by all of said defendants; and the said Durbin, by his negligence in running, ordering, and directing said train, contributed to the cause of said accident; and the plaintiff says that the negligence of the defendant (Chicago, St. Louis & New Orleans Railroad Company) in its maintenance of its tracks, roadbed, engine, cattle guards, rails, ties, fences. etc., as above set out, and together with the negligence of the said Illinois Central Railroad Company, in directing and permitting its engine, cars, and road to be operated while in a defective and dangerous condition, and the negligence of the said conductor, in ordering and directing the running and management of said train, and in failing to give proper directions, all together, jointly caused said wreck and killed the plaintiff's said intestate," etc. That his intestate was a young, vigorous man, an excellent locomotive engineer, intelligent, sober, industrious, of most excellent habits and prospects, and making and saving large sums of money, and, by the joint gross negligence of the defendants in thus causing his death, the plaintiff has been damaged in the sum of $25,000. The plaintiff further alleged that his place of residence, as well as that of his intestate, to the date of his death, was in Central City, Muhlenburg county, Kentucky;

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that the defendant Illinois Central Railroad Company was a corporation organized under the laws of the state of Illinois, and the defendant Chicago, St. Louis & New Orleans Railroad Company, was a Kentucky corporation organized under the laws of this State, and the defendant F. J. Durbin was a resident and a citizen of the state of Kentucky.

The defendant Illinois Central Railroad Company filed its petition and bond for removal of the case to the federal court, alleging a separable controversy between it and appellee determinable between them without either of its codefendants, and alleging joinder of its codefendants in fraud of federal jurisdiction. The court refused to transfer the case. Then each of the defendants filed a separate answer, denying all material allegations of the petition. The issues being completed, a trial was had, which resulted in a verdict for appellee as against the Illinois Central Railroad Company for $8,250, and on peremptory instructions the jury found for the other two defendants. The Illinois Central Railroad Company appeals, and assigns the following reasons for reversal: First, the admission of incompetent and the rejection of competent evidence; second, erroneous instructions to the jury; third, the refusal of the court to give a peremptory instruction to find for it; fourth, the refusal of the court to surrender jurisdiction to the federal court.

The third assignment for reversal necessitates our stating the substance of the evidence. Appellee's testimony conduces to show the following facts: The deceased was a young man, about 29 years old, sober, industrious, of good habits, strong, and in good health. That he had been following the avocation of railroad engineer for about eight years. That his run was

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from Central City, his home, to Paducah, Ky. That he was killed on appellant's line of road which connects with the main line at Princeton, Ky., and extends to Evansville, Ind., known as the Ohio Valley Line. The deceased had only made about two trips on this line, both at night; one about three weeks before, and the one on which he was killed. When the train reached a flag station called "Harding," in Union county, Ky., the engine struck a mule, turned over, and the deceased was instantly killed. No one lived at this station. A public road passes by it, crossing the railroad at right angles. From this public road running south, the way the train was going, a distance of about 150 or 200 yards to a culvert, the road is fenced on either side; but there were no cattle guards at the public road, and loose stock, according to the evidence, passed into this cul-de-sac, and grazed on either side of the track. The proof shows that this mule came upon the track in front of the engine, and made a few jumps south, and then was struck by the engine and cut in two, leaving the front part on the left of the track between the ends of two ties. From this point the evidences of the small wheels that supported the pilot were noticed on the ties for 15 or 20 feet, and from that point the large drive wheels of the engine were thrown from the rails, and from that point to 20 or 30 feet beyond the culvert the ties, rails, and everything were swept clean. The proof shows that the engine was fitted with a stub pilot, instead of with a standard pilot; that the stub pilot stood four or more inches above the rails, and had but the slightest slant; that the standard pilot was very slanting, extended out in front of the engine four or five feet, and rested only two inches above the rails; and that, with it in use, when the track

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is properly constructed, and reasonably well ballasted it was almost impossible for stock when struck to get under the train—the pilot would knock them off. The testimony showed, without much contradiction, that the portion of the track described had never been ballasted; and that the ties were laid on dirt; that much of it had been washed away, so that it did not come to the top of the ties; that a track is properly ballasted when crushed stone, gravel, or cinders are tamped under, upon, and between the ties, and up to a point about even with the top of the rails (and such was the condition of the track at each end of this cul-de-sac); and that this track as constructed left about 14 or 16 inches from this stub pilot to the dirt between the ties, which made the chances of clearing the track of stock when struck by the pilot doubtful. It was proved by some of the section hands on the road that this part of the track had been in that condition for a long time, and the general superintendent of the road had had his attention called to it, and had been requested to furnish material to put that part of the road in reasonably safe condition, but had failed to do so up to the time of the accident. They also stated that the track as laid would often get out of alignment, and that they were compelled, by the use of jackscrews, to force it back. Many witnesses testified that they had been at this point when trains passed, and saw that the track was insecure; that engines and cars would wabble in passing over it, would sink in some places, and rise in others, would mash some ties down, and water and mud would gush up over them; that when trains had passed, the rails would straighten and raise some of the ties two inches from the earth. Many witnesses examined the conditions there after the wreck, and about all of them testify

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that there were many rotten ties. Some of them stated that more than one-half were rotten, that some of them had rotted into two pieces, and so rotten that they could pull the spikes from them with their fingers.

The most serious complaint made by appellant to the instructions is that the court gave an instruction on punitive damages. Section 241 of the Constitution, and section 6 of the Kentucky Statutes of 1903 provide that, whenever the death of a person results from an injury inflicted by negligence, damages may be recovered for such death; and, when the negligence is gross, punitive damages may be recovered. It is certain from the evidence that those in charge of the railroad knew of its defective condition; and it was gross negligence on appellant's part to direct or suffer its trains to be run from 20 to 30 miles an hour at this point, knowing also that they had failed to put cattle guards at the public crossing, and that stock might be expected in this cul-de-sac at any time. Appellant's conduct in this evidenced a reckless disregard of the rights and safety of those whose business required them to travel over this road. There were no errors in the instructions prejudicial to the substantial rights of appellant; nor did the court commit any prejudicial error in the admission or rejection of evidence.

The main contention of appellant is that the court erred in refusing to surrender jurisdiction to the federal court. There is no question but that the petition of appellee, the administrator of deceased, stated a joint cause of action against all three of the defendants. This is conceded. Upon the filing of the petition by appellant for removal of the case to the federal court, it was the duty of the judge of the State court to determine from the petition and record

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whether or not there was presented a federal case; if so, it was his duty to proceed no further, but to remove the case to the federal court, and it was the duty of that court to hear the proof on the jurisdictional facts, or questions raised by the petition for removal, and determine whether the federal court or State court had jurisdiction of the case. In the case of Crehore v. Ohio & Mississippi Railway Co., 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144, the court, Justice Harlan delivering the opinion, said: "If the case be not removed, the jurisdiction of the State court remains unaffected, and, under the act of Congress, the jurisdiction of the federal court could not attach until it becomes the duty of the State court to proceed no further. No such duty arises unless a case is made by the record that entitles the party to a removal." In the same opinion the court further said: "It thus appears that a case is not, in law, removed from the State court, upon the ground that it involves a controversy between citizens of different states, unless, at the time the application for removal is made, the record, upon its face, shows it to be one that is removable. We say, upon its face, because 'the State court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further;' and 'all issues of fact made upon the petition for removal must be tried in the circuit court' " — meaning the federal court. See the following cases, which announce the same rule: Stone v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Stevens v. Nichols, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914; Phoenix Ins. Co. v. Pechner, 95 U. S. 183, 24 L. Ed. 427; Powers v. Railroad Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. And the following decisions of this State recog-

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nizing the same rule: McCabe's Adm'x v. Maysville & Big Sandy Railroad Co., 112 Ky. 861, 23 Ky. Law Rep. 2328, 66 S. W. 1054; Rutherford v. Illinois Central Railroad Co., 120 Ky. 15, 85 S. W. 199, 27 Ky. Law Rep. 397; and Illinois Central Railroad Co. v. Jones, 118 Ky. 158, 80 S. W. 484, 26 Ky. Law Rep. 31. In this last case the court said: "If both the State and federal courts could try the same facts as to jurisdiction, different conclusions might be reached, and unseemly conflict and confusions result. To avoid these, the Congress has wisely made the condition of the federal court's jurisdiction to depend upon the filing in the State court in due time of a petition, in which, according to the unbroken current of the decisions of the federal courts construing the act, all necessary facts to show prima facie a right in the petitioner for the removal must be set out, not as conclusions of law, or such necessary facts must affirmatively and explicitly appear elsewhere in the record when the application to the State court for the removal is made. Crehore v. Ohio R. R. Co., 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; Freeman v. Butler (C. C.) 39 Fed. 1 (opinion by Barr, District Judge); Jackson v. Allen, 132 U. S. 27, 10 Sup. Ct. 9, 33, L. Ed. 249; Smith v. Horton (C. C.) 7 Fed. 270; Amory v. Amory, 95 U. S. 186, 24 L. Ed. 428; Weed Sewing Machine Co. v. Smith, 71 Ill. 204; Chester v. Chester (C. C.) 7 Fed. 1; Burlington, etc., Ry. Co. v. Dunn, 122 U. S. 517, 7 Sup. Ct. 1262, 30 L. Ed. 1159; Railway Co. v. Ramsey, 22 Wall (U. S.) 322, 22 L. Ed. 823; Grace v. Am. Central Ins. Co., 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; Gold W. & W. Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656; Carson v. Dunham, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; Removal Cases, 100 U. S. 457, 25 L. Ed.

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593; Yulee v. Vose, 99 U. S. 539, 25 L. Ed. 355. The truthfulness of these facts may then, and not till then, be inquired into in the federal court. As the petition for the removal and the record in this case did not in our opinion state facts sufficient to confer jurisdiction upon the United States circuit court, that tribunal had not the right to inquire into their truthfulness, nor to hear evidence of other facts not alleged in the record or the petition for removal, and by adding such evidence to the insufficient allegations find the needed jurisdictional facts."

The question now for consideration is: Did the court err in refusing a removal of the case to the federal court? As stated, it is conceded that a joint cause of action was alleged in the petition of appellant against all three of the defendants. The common-law distinction between different forms of action has been abolished by our Code of Practice, and all persons who are liable for a wrong may now be sued jointly in this State in an action to recover for negligence. See McCabe's Adm'x v. Maysville & Big Sandy Railroad Co., supra. The petition for removal denies the negligence charged in the petition. This is not a jurisdictional fact under all the authorities. In an attempt to show that the Chicago, St. Louis & New Orleans Railroad Company was joined as defendant with it wrongfully, it was alleged in the petition for removal that the Chicago, St. Louis & New Orleans Railroad Company was empowered to construct and lease to the petitioner its railroad mentioned in plaintiff's petition; and stated that it was so empowered by an act of the General Assembly of the Commonwealth of Kentucky, long prior to the adoption of the present Constitution of the Commonwealth of Kentucky, which act of the General Assem-

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bly became a law on the 24th day of February, 1882; and that, pursuant to such powers, the Chicago, St. Louis & New Orleans Railroad Company, being the owner, leased to the petitioner all of the railroad mentioned in the petition, and parted with all dominion over it; and that your petitioner has since the lease (1897) continuously operated the railroad exclusively, and the lessor never at any time operated it. Even if this plea could be made available, the petition was defective; it was an attempt to plead a private statute. Section 119 of our Civil Code of Practice provides: "In pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law." The title of the act is not stated in the petition, nor is there any attempt to state it. The contents of the act is not stated. The petitioner only alleged its conclusions as to the contents, which were that the Chicago, St. Louis & New Orleans Railroad Company had the power to construct and lease to the petitioner the railroad. The same remarks will apply to the alleged contract of lease, the contents of which is not stated in the petition, nor a copy filed. The conclusion was that the lease gave it dominion over the road and under same it operated the road. It is admitted that the Chicago, St. Louis & New Orleans Railroad Company was and is the owner of the road, that it still maintains its corporate organization and existence, but, instead of operating the road itself directly, has bargained with the Illinois Central Railroad Company to run it for a compensation, as we must suppose, as the terms of the lease are not stated in the petition for removal. Even if the act and the lease had not been defectively pleaded, the result would be the same. The Chicago, St. Louis & New Orleans Railroad Company was given

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a franchise by the State, and it therefore assumed certain burdens, and, under the Constitution and laws of this State, it cannot by a lease exempt itself from responsibility for the torts of itself and lessee. In the case of Lee v. Southern Pacific R. R. Co., 47 Pac. 932, 116 Cal. 97, 38 L. R. A. 71, 58 Am. St. Rep. 140, the court said: "Where a statute authorizing leases contains no clause exempting in any respect the lessor from liability, it is well settled that the lessor still remains liable for an injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction of its roads, station houses," etc. Section 203 of the State Constitution is in these words:

"No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges." The court in construing this section of the Constitution, in the case of McCabe's Adm'x v. Maysville & Big Sandy R. R. Co., supra, said: "The franchises of a corporation are its property. The declaration that these, in case of a lease or alienation, shall not be relieved from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the use of the franchise, or any of its privileges, is, in substance, a declaration that the corporation shall not be relieved of such liability, for its existence is inseparable from all of its franchises. Under this section, therefore, no lease made by a corporation can exempt it from liability for the wrongs of the lessee. If the lease in question was made after the adoption of the Constitution, it would not exempt the lessor from liability; * * * but, if it was made before

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the adoption of the Constitution, the result is the same." In the same case, the court again said: "The defendant company, therefore, in reality still enjoys the benefits of its charter, and cannot be permitted to escape its corresponding obligations. * * * A grant to a corporation of a right to lay out, construct, and operate a railroad is the grant to the corporation of the capacity to exercise a portion of the power of sovereignty for the purpose of making pecuniary profit to itself. This is its franchise. Such grants are never made, except at the request of the corporation. In return, the corporation is held to have promised to pay just damages to any person injured by any want of care in using the right so granted. As the grant is of a public right, in which every one of the public is a sharer, so the promise is to each one of the public. A due regard for the public rights obviously requires that a corporation which has asked for and received such a grant shall not be absolved from its promises, except by an act of the Legislature to that effect, so distinct and unequivocal as not to be open to mistake. 'Nothing should be left to inference. * * * The sanction of the Legislature was given to the contract as made by the parties, but added nothing by way of exemption from the primary responsibility of the lessor. It was under a positive duty and obligation to the public, and the consent of the Legislature to the making of the lease did not imply a discharge from the duty and obligation. * * * Where a corporation seeks to escape from the burden imposed upon it by the Legislature, clear evidence of a legislative assent to such exoneration should be found."

It will be seen from the petition of removal that there is no allegation that the act authorizing the

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lease even attempted to relieve the lessor from its primary responsibility to the public; and the court in the McCabe Case, continuing, said: "After conferring upon a corporation the right of eminent domain, with many other special privileges which the Legislature is empowered to grant only in consideration of its duty and obligation to serve the people by affording them the means of safe as well as speedy transportation for themselves and their property, the State cannot be held to have abdicated its right to protect the patrons of the road who are under its care by the strained construction of a naked power to lease. Such a power does not carry with it the authority to the lessor to absolve itself and transfer its duties and obligations to another, whether able or unable to respond in damages for its wrongs and defaults.' See, to the same effect, Balsley v. Railroad Co., 119 Ill. 68, 8 N. E. 859, 59 Am. Rep. 784; Singleton v. Southwestern R. R., 70 Ga. 464, 48 Am. Rep. 574; Tillett v. Railroad Co., 118 N. C. 1031, 24 S. E. 111; Railroad Co. v. Morris, 68 Tex. 59, 3 S. W. 457; Chollette v. Railroad Co., 26 Neb. 169, 41 N. W. 1106, 4 L. R. A. 135; Parr v. Railroad Co., 43 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826; Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559; Stephens v. Railroad Co., 36 Iowa, 327; Bower v. Railroad Co., 42 Iowa, 546; Railroad Co. v. Lee, 71 Tex. 538, 9 S. W. 604. * * * If it be true, as the decisions with substantial unanimity admit, that the lessor railway remains liable for the discharge of its duties to the public, unless expressly exempted therefrom by statute, it seems difficult to conceive its absence of liability in any event, except, perhaps, where the plaintiff is suing upon an express contract made with him by the lessee corporation. Is it not as much a public duty on the part of

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the railway corporation to operate its trains without negligence as it is to receive all freight offered for transportation, or to carry all passengers who offer to pay the regular rates, or to keep its tracks and station houses in safe condition? In truth, we do not know of any duties of a railway corporation which are of a private character. * * * By its acceptance of the franchise conferred by the State, the corporation assumed the corresponding burdens thereby imposed. These franchises it could not transfer to another without distinct legislative authority. The grant of power to lease its property is one thing; the grant of absolution from its responsibility is another, and is not to be inferred from a mere power to lease the road, where the corporation still retains its existence and the enjoyment of its franchises in the rents, for such grants are strictly construed, and, as against the public, are never extended by any construction. In the case before us, there is only a grant to the lessor of power to contract for the operating of the road. The company enjoys all its franchises in the fruits of the contract. There is nothing in the provision to show that the Legislature had in mind authorizing the company to divest itself of its franchise, or permitting it, while enjoying them or their fruits, to be acquitted of responsibility for their abuse, without regard to the financial ability of the lessee or his amenability to suit."

But it is said that this responsibility of the lessor does not apply to the employes of the lessee of the road, that the lessor owed no duty to them, and that they are not members of the public in the sense used in the decisions on that subject. It is true that the courts in part have made this distinction, but have only extended the rule and exempted the lessor from

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torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased property, but hold the lessor bound for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc. In the case of Swice's Adm'x v. Maysville & B. S. Ry. Co., 116 Ky. 253, 24 Ky. Law Rep. 1142, 75 S. W. 278, this distinction was recognized to be the true rule.

The case of Charles A. Lee v. Southern Pacific Railroad Company, 47 Pac. 932, 116 Cal. 97, 38 L. R. A. 71, 58 Am. St. Rep. 140, appears to have been well considered, and the authorities carefully collated. In that opinion the court said: "In Nugent v. Boston, C. & W. R. Co., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151, the defendant railroad, under express authority of law, had leased its road to the Portland & Ogdensburg Railroad, which latter road was engaged in its management and operation. A brakeman of the Portland & Ogdensburg sued defendant for personal injuries received by reason of the negligent construction of an awning at a station house built by defendant company. The case received elaborate consideration. The action of the brakeman against the owning road was sustained, and the rule deduced in the following language: 'Herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty

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owed to the public, such as the proper construction of its road, station houses, etc., the charter company cannot, in the absence of statutory exemption, discharge itself of legal responsibility.' In Arrowsmith v. Nashville & D. R. Co. (C. C.) 57 Fed. 165, the same rule is enunciated, and numerous authorities cited in support thereof. Indeed, a somewhat extended examination of the cases justifies the conclusion that this principle, at least, is accepted without conflict. An analysis of the case of East Line & R. R. Co. v. Culberson, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805, a case upon which respondent strongly relies, will disclose that the law there enunciated is not only not at variance with the principle above mentioned, but embodies a distinct recognition of it. In that case an employe of the operating company sued the lessor company, claiming damages for injuries sustained by reason of defective appliances furnished by the operating company. The court held, and very properly, that such an action would not lie against the lessor company, and said: 'It may be that if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable; but if it were true that the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its own employes by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable, merely because it owned the road. In all cases where a valid lease is found (or, as in this dicussion where it is assumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of rela-

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tionship of employer and employe under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company, when it attaches, does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employe of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employe of the operating company by reason of the negligence of a fellow servant, or of want of care of the lessee company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible. But where injury has resulted to an employe of the operating company by reason of a failure of the lessor to perform its public duty, as in the failure to construct a safe road, as is here charged, the injured employe may sue the lessor company, as one of the public, for its failure to perform that duty, and not because, between himself and the lessor company, the relation of employe and employer, or any relation of contractual privity, exists. As is said in Nugent v. Boston & M. R. Co., 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151, where the brakeman of the lessee road was injured by reason of the defective construction of the station house by the charter company; 'Our opinion, therefore, is that the plaintiff had the lawful right, as brakeman on the train of the P. & O., to pass and repass by the Bethlehem station house of the defendant which, therefore, owed a duty to him to construct and maintain its station house there in such a reasonably safe manner that its awning would not injure him while in the performance

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of his duty with due care, and that a negligent breach of that duty by the defendant, having resulted in a personal injury to the plaintiff without fault on his part, he is entitled to maintain this action therefor.' So, here, the charge against the defendant is that the injury resulted by reason of its imperfect construction and maintenance of the rails and tracks of its road. The verdict of the jury for plaintiff is its declaration that the charge was substantiated by the evidence, and the nature of the omission or dereliction is such as to entitle the plaintiff to compensation from the defendant herein for injuries which may have resulted to him by reason of it."

This case is very similar to the one at bar, in which it was alleged and proved that the intestate's death was the proximate result of the failure of the lessor to perform its public duty in its failure to construct a safe roadbed. In the cases of the Illinois Central R. R. Co. v. Coley, 89 S. W. 234, 1 L. R. A. (N. S.) 370, 28 Ky. Law Rep. 336, Dudley v. Illinois Central R. R. Co., 96 S. W. 835, 29 Ky. Law Rep. 1029, and P. A. Underwood's Adm'r v. Illinois Central R. R. Co., 103 S. W. 322, 31 Ky. Law Rep. 595, this court recognized the rule to be that, although the petition for removal of the case failed to allege any jurisdictional facts which would authorize the removal of the case, yet, if on the trial it is developed that the plaintiff in the action had not reasons for believing that the resident defendants in the action were responsible to him, in damages, and it is made evident that their joinder as defendants with the nonresident was made for the purpose of depriving the federal court of jurisdiction to try the case, then this court will reverse and remand, with directions to the lower court to remove the case to the federal

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court; but the case at bar does not come within this principle. The appellee not only had reasonable grounds to believe that the resident corporation was responsible to him, but he had actual grounds to believe it. At the close of the evidence, and when the court gave peremptory instructions in behalf of the resident corporation and F. J. Durbin, appellant, Illinois Central Railroad Company again filed its petition and bond, and asked for a removal of the case to the federal court, which motion the court overruled, and in our opinion properly. Instead of the evidence showing an improper joinder of defendants, it made it plain that the joinder was proper.

For these reasons the judgment of the lower court is affirmed.

Petition for rehearing by appellant overruled.

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CASE 33.—PROSECUTION AGAINST THE L. & N. R. R. CO. FOR A VIOLATION OF THE LOCAL OPTION LAW.—June 20.

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129 425

Louisville & N. R. R. Co. v. Commonwealth

Appeal from Laurel Circuit Court.

H. C. FAULKNER, Circuit Judge.

Defendant convicted and appeals.—Reversed.

1. Intoxicating Liquors—Sales—Persons Liable.—Under Ky. Stats., 1903, Sec. 2572, providing that the person in possession of premises on which liquor is sold in violation of law shall be fined, etc., a railroad company cannot be fined for permitting an express company, having its office in the railroad company's building, to deliver whisky and collect money for it, where the express company was authorized by law so to do.
2. Same—Prosecution—Evidence.—Ky. Stats., 1903, Sec. 2572, provides that the person in possession of premises on which liquor is sold in violation of law shall be subject to fine, etc. Held, that proof that an express company having an office in the building owned by defendant railroad company, delivered whisky which had not been ordered and collected money for it, in a county where the local option law was in force, while showing a sale there of the whisky, was not conclusive, defendant being entitled to show that the transaction was one of interstate commerce, conducted according to he usual course of business, and that the express company in delivering the whisky and collecting the money for it acted in good faith, without knowing or having reasonable grounds to believe that the package it delivered contained whisky or had not been ordered, in which event defendant would not be guilty.
3. Same—Good Faith.—Ky. Stats., 1903, Sec. 2572, provides that the person in possession of premises on which liquor is sold in violation of law shall be fined, etc. Held, in a prosecution against a railroad company for permitting an express company having an office in defendant's building to sell liquor in

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violation of law, the Commonwealth should not be confined on the question of the good faith of the express company in acting in ignorance of the fact that the package delivered by it contained whisky, etc., to proof of the one transaction named in the indictment, but should be allowed to show the manner in which the business of the office was conducted, and such other facts as are competent under the rules of evidence, where the question of intent or good faith is involved.

4. Courts—Previous Decisions by United States Supreme court—Effect in State Court—Interstate Commerce—Intoxicating Liquors.—In a prosecution under Ky. Stats., 1903, Sec. 2572, providing that the person in possession of premises on which liquor is sold in violation of law shall be fined, etc., where an interstate shipment is involved, the rules laid down by the United States Supreme court must control.

J. W. ALCORN, T. B. HARRISON, JR., and BENJAMIN D. WARFIELD for applicant. (No briefs in record.)

N. B. HAYS, Attorney General, and C. H. MORRIS for Commonwealth.

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

Section 2572, Ky. St. 1903, is in these worls: "The person in possession of the premises on which liquor is sold, disposed of, obtained or furnished in violation or evason of law, by any trick or method whatever, on conviction, shall be fined not less than twenty nor more than one hundred dollars for each offense, and each time such liquor is sold, disposed of or furnished in violation or evasion of law, shall be deemed a separate offense under this act against the person in possession of the premises on which said liquor is obtained, furnished, or disposed of." The Louisville & Nashville Railroad Company was indicted under this statute. The charge in the indictment is that it unlawfully, and knowingly suffered and permitted the Adams Express Company and its agent, Bill Sams, to sell to Robert Ridings from its depot and office in

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Pittsburg, in Laurel county, spirituous and malt liquors in quantities of less than five gallons, in violation of the local option law, on premises in its possession and under its occupancy and control. The defendant pleaded not guilty. A trial was had resulting in a judgment against the defendant for a fine of $100, and it appeals.

The facts shown on the trial are as follows: William Sams was the agent of the railroad company and also of the express company at Pittsburg, in Laurel county. He delivered to Robert Ridings a box containing four quarts of whisky, for which he received $3.80. Ridings had not ordered this whisky. He got it from William Sams the agent. His testimony is as follows: Q. What amount of money did you pay him? A. Three dollars and eighty cents. Q. How did you happen to know the whisky was there? A. Why the boxes would just come there in my name, and I would go and get them and pay for them. Q. Did you order this box of whisky that you speak of? A. No, sir. Q. Did you know that it was going to be shipped there to you? A. No, sir; just when one would come in my name I would go and get it and pay for it." On cross-examination he testified as follows: "Q. Do you know how the party who shipped this whisky to you—do you know how he happened to find out there was such a fellow as you? A. I heard there was fellows going through there and getting names of fellows, and shipping whisky to them. Q. Did you ever find a package there that you did not take out? A. He might have sent some back. Q. How was this put up, Mr. Ridings? A. In a square box. I believe it said 'Glass' on the box. Q. Is that all it said? A. I don't remember anything else. Q. Your name was on it? A. Yes, sir; my name was on it. Q. And your

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address—'Pittsburg, Kentucky'? A. Yes, sir; I suppose it was. Q. And 'Glass'; and that is all that was on it? A. Yes, sir. Q. Where was it from? A. I don't believe it said on the outside of the box. Q. I am asking where it came from—not what it said? A. On the bottles of whisky it said something about Cincinnati, Ohio. Q. Do you remember the name of the distillery? A. White Oak Distillery Company. Q. First district of Ohio? A. I don't remember about that. Q. Did you ever get any packages out of the depot or express office in Pittsburg that did not contain whisky? A. No, sir; I don't know that I ever did." Sams was put on as a witness for the defense, and testified as follows: "Q. Had you any belief or information as to what the contents were? (Defendant objects. Objection overruled. Defendant excepts.) A. I never gave it any thought. Q. I want to know, Mr. Sams, if you had any belief or information as to what the box contained? (Defendant objects. Objection overruled. Defendant excepts.) Q. Of course, I know you didn't know, because you didn't see in the box; but I want to know if you had any information or belief as to what it contained? A. No, sir; I didn't know. Now, Mr. Sams, I didn't ask you what you knew. I asked if you had any knowledge or information about it. (Defendant objects. Objection overruled. Defendant excepts.) A. I don't know as I did, I never formed any opinion about it. Q. Mr. Sams, how many such boxes as those were handled in the depot at Pittsburg in the 12 months next before the 13th day of July, 1906? About how many? (Defendant objects. Objection overruled. Defendant excepts.) A. I don't know. Q. About how many? A. I don't know. I don't have any idea. We handled several boxes. Q. And didn't you handle several hun-

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dred boxes? A. No, sir. Q. How much would be a safe estimate, Mr. Sams? A. I don't know. Q. How do you know there were not several hundred, then? A. Because I know there were not. We handled several boxes, but not several hundred. Q. Do you think there were as many as a hundred? A. Yes, sir. Q. Any more? A. I don't know but what there was. Q. How many would you have in the depot at one time? A. Six or eight, and sometimes not any. Q. How regular would they come there? A. I suppose whenever a man would order them. Q. I suppose that, too; but I want to know how many were kept there regularly in the depot? A. I don't just understand you. Q. How many boxes were kept in the depot regularly? A. I don't know. Q. How often would they come in the year? A. Sometimes every day or every other day. Q. Do you remember any week in the entire year that you didn't get more or less? A. No, sir. Q. You knew you were sending the money back to a whisky house in Cincinnati? A. Yes, sir."

Pittsburg in Laurel county is a mining town of several hundred inhabitants, and, while the proof in the case is not as full as in the case of Adams Express Company v. Commonwealth, 124 Ky. 182, 92 S. W. 932, 5 L. R. A. (N. S.) 630, 29 Ky. Law Rep. 224, the proof indicates much the same manner of doing business. In Adams Express Company v. Commonwealth, 87 S. W. 1111, 27 Ky. Law Rep. 1096, it was held by this court that whisky was sold where it was delivered and paid for, though it was shipped C. O. D., if there was no order for the whisky and the consignor shipped the whisky to the consignee without his knowledge. But on appeal to the United States Supreme Court of that case it was held that the indictment was not a charge of selling the whisky, and that the

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proof that it was sold by the express company to the consignee was immaterial. The court said: "With reference to the testimony as to the knowledge by the company of the fact that the whisky had not been ordered by the consignee, it is sufficient to say that the averment in the indictment is that the express company was engaged in the business of a common carrier of packages, etc., and that the shipment and delivery were made and done in the usual course of its business. This excludes necessarily the assumption that the transaction was one of sale by the express company at East Bernstadt, and, of course, the company was under no obligation to offer testimony in support of that which the State admitted to be the fact. We do not mean to intimate that an express company may not be engaged in selling liquor in a state contrary to its laws, or that the fact that the consignee did not order a shipment, might not be evidence for a jury to consider upon the question whether the company was not, in addition to its express business, also selling liquor contrary to the statutes. It is enough to hold, as we do, that under the averments of this indictment such testimony is immaterial. It is, of course, a question of fact whether a carrier is confining itself strictly to its business as a carrier, or participating in illegal sales. The consignor alone may be trying to evade the statute. He may forward the liquors in the expectation that the consignee will, when informed of their arrival, take and pay for them. So the fact that there is no previous order by the consignee may not be conclusive of the carrier's wrongdoing, but still it is entitled to consideration in determining that question. Much as we sympathize with the efforts to put a stop to the sales of intoxicating liquors in defiance of the policy of a state, we are not

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at liberty to recognize any rule which will nullify or tend to weaken the power vested by the Constitution in Congress over interstate commerce." The form of the indictment in the case before us is not such as to make it possible to give it the construction given the indictment in that case. The charge here against the railroad company is that it knowingly suffered the whisky to be sold on its premises. The whisky in contest was sold somewhere. If it was sold on the defendant's premises with its knowledge and consent, it is ordinarily immaterial where it came from, or how it got to the defendant's premises. If a man living in Louisville should take his whisky in his hand, and sell it from the station at Pittsburg with the knowledge and consent of the defendant, it would be liable. It is to the same extent liable if, instead of bringing it there by his own hand, he sent it there, and sold it there by the hand of his agent, the express company. The effect is the same where the whisky comes from a point without the State as where it comes from a point within the State. If this would have been a sale of the whisky at Pittsburg if the whisky had been shipped from Louisville, it is a sale of the whisky at Pittsburg when it was shipped from Cincinnati. Sams, who sold the whisky to Ridings and received the money, was the agent of the railroad company, and as such had posession of the building. He was representative of the railroad company for that purpose. Notice to him was therefore notice to the company.

But the railroad company cannot be fined under the statute for suffering the express company to do what the law authorized it to do. If the express company was authorized by law to deliver the whisky and collect the money for it, then section 2572, Ky. St.

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1903, canot be applied to the transaction. When the State showed that the whisky had not been ordered, and that the express company delivered the whisky and collected the money for it in Laurel county where the local option law is in force, it showed a sale there of the whisky. But this showing, as held by the United States Supreme Court, is not conclusive. The defendant may show that the transaction was one of interstate commerce conducted according to the usual course of business, and that the express company in delivering the whisky and collecting the money for it acted in good faith, without knowing or having reasonable grounds to believe that the package it delivered was whisky or had not been ordered, in which event the jury should find the defendant not guilty. Reasonable grounds to believe a fact are such grounds as will induce a person of ordinary prudence under like circumstances to so believe. In Bishop on Statutory Crimes, section 132, the rule is thus stated: "One who, while careful and circumspect, is led into a mistake of facts, and, doing what would be in no way reprehensible were they what he supposes them to be, commits what under the real facts is a violation of a criminal statute, is guilty of no crime, because such is the rule of the common law, and in construction it restricts the statute." Again, in section 1022, it is said: "Where the statute is silent as to the defendant's intent or knowledge, the indictment need not allege or the government's evidence show that he knew the fact. His being misled concerning it is matter for him to set up in defense and prove." These statements of the law are supported by a number of authorities. An illustrative case is Myers v. State, 1 Conn. 502. There a statute was in force punishing the letting of a carriage for the conveyance of per-

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sons on Sunday, except for necessity or charity. The defendant was told by the person to whom he hired the carriage that it was needful for charity, and, acting honestly under this impression, let him have the carriage. A conviction was reversed, the court holding that the jury should have been instructed that if the defendant had reasonable grounds to believe from the representations made to him that a case of charity existed, and that if he acted honestly under the impression of that belief, they should find him not guilty. The same principle has been applied in a number of similar cases where the defendant acted honestly, in the regular course of business, under a mistake of fact. But in this class of cases as the statute makes the sale of the whisky in a local option district an offense, when the State shows a sale, it has made out its case, and it is then incumbent upon the defendant to show that it acted in the usual course of business honestly and under a mistake of fact. The defendant must not shut its eyes, but must use ordinary circumspection, and, if the facts before it are sufficient to apprise a person of ordinary prudence of the truth, it cannot escape liability. On the question of the good faith of the express company the Commonwealth should not be confined in the proof to the one transaction named in the indictment, but should be allowed to show the manner in which the business of the office was conducted, and such other facts as are competent under the rules of evidence where the question of intent or good faith is involved.

The instructions of the court were not in accord with the principles laid down by the United States Supreme Court, and, as this was an interstate shipment, the rules announced by that court must control.

Judgment reversed, and cause remanded for a new trial.

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CASE 34.—ACTION BY ED BUCHANAN AGAINST ILLINOIS CENTRAL RY. CO., FOR DAMAGES FOR NEGLIGENT TREATMENT BY SURGEONS AND ATTENDANTS IN THE RAILROAD COMPANY'S HOSPITAL AT PADUCAH, KY. ON PETITION FOR REHEARING JUNE 25, 1907. FOR ORIGINAL OPINION SEE 27 KY. LAW REP., 1193; 88 S. W., 312.

Illinois Cent. Ry. Co. v. Buchanan

Appeal from Hopkins Circuit Court.

J. F. GORDON, Circuit Judge.

On petition for rehearing.—Reversed.

Charities—Hospitals—Negligence—Injury to Employe—Negligence of Employer.—A railroad hospital organization was organized as a corporation independent of defendant railroad; its directors being certain officers of the railroad. All employes of the railroad were, as such, members thereof, supporting the hospital by monthly contributions. No profit was derived by the railroad company from the conduct or operation of the hospital. The physicians, surgeons and nurses in charge were selected by the directors and officers. Held, that for failure to select skilful and competent physicians and attendants defendant was liable to an employe injured by reason thereof.

TRABUE, DOOLAN & COX for appellant.

J. M. DICKINSON, GORDON & GORDON and COX of counsel.

POINTS AND AUTHORITIES.

1. There was no contract between plaintiff and defendant for "proper treatment:" Union Pac. R. R. Co. v. Artist, 65 Fed. Rep., 365; 23 L. R. A., 581; Richardson v. Carbon Hill Coal Co. (Washington), 20 L. R. A., 338.

2. The hospital association is a charitable institution and is governed by the principles of law applicable to such institutions:

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Articles of Incorporation, Illinois Central Railroad Hospital Association, attached to transcript of testimony; Union Pac. R. R. Co. v. Artist, 60 Fed. Rep., 365; 23 L. R. A., 581; McDonald v. Massachusetts General Hospital, 120 Mass., 432; 21 American State Rep., 529; Fire Ins. Patrol v. Boyd, 120 Pa., 624; 1 L. R. A., 417; Van Tassel v. Manhattan Eye and Ear Inf., 15 N. Y. Supp., 620, and note; Glavin v. Rhode Island Hospital, 12 R. I., 411; 34 Am. Rep., 657; Laubheim v. De Koninglyke Nederlandsche Stoomboot Maatschappy, 107 N. Y., 228; Secord v. St. Paul M. & M. R. R. Co., 18 Fed., 221; Richardson v. Carbon Hill Coal Co., 6 Washington, 524; 20 L. R. A., 338; Williamson, by, etc., v. Louisville Industrial School of Reform, 15 Ky. Law Rep., 629; 22 L. R. A., 200; Eighmy v. Pac. Ry. Co. (Iowa), 27 L. R. A., 236; Allan v. State Steamship Co., 132 N. Y., 91; 15 L. R. A., 166; Herns v. Waterbury Hospital (Conn.), 31 L. R. A., 224; Hill v. Boston, 122 Mass., 344; 23 Am. Rep., 332; Powers v. Mass., etc., Hospital, 109 Fed., 294.

3. There would be no liability upon the railroad company, even should the court hold that the surgeons attending plaintiff were surgeons of the railroad company for the reason that the relation of master and servant does not exist: L. & N. R. R. Co. v. Foard, 104 Ky., 456; Quinn v. Kansas City M. & B. R. R. Co., 30 S. W., 1036; Robinson v. Webb, 11 Bush, 464; O'Brien v. Cunard, etc., Co., 28 N. E., 266; P., C., C. & St. L. Ry. Co. v. Sullivan, 27 L. R. A., 840; Pearl v. Street Ry. Co. (Mass.), 47 L. R. A., 397.

C. J. WADDILL for appellee.

PROPOSITIONS DISCUSSED.

Appellant owed appellee as its employe under the facts of this case the legal duty to furnish him proper treatment at its hospital and is responsible for injury caused by improper treatment.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Appellant has established at Paducah, Ky., a hospital, known as the "Illinois Central Railroad Hospital," to which are sent as a part of its system of policy all sick, disabled, and injured employes on the lines of its road in the vicinity of Paducah. It was

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incorporated under the laws of Kentucky, and its directors and officers are taken from the chief officers of the railroad company, and the physicians, surgeons, and nurses in charge are selected by these directors and officers. It does not appear that any profit or gain is derived by the railroad company from the conduct or operation of the hospital. It is supported by monthly contributions exacted from the employes of the company, who are entitled to admission.

Appellee, an employe entitled to admission, was injured in the service of appellant, and sent to the hospital for treatment. In this action he sought to recover damages from appellant upon the ground that the surgeons and attendants who waited upon and cared for him during the time he was confined in the hospital were incompetent and unskilled, and treated his wounds in an unskillful and grossly negligent manner, causing him to suffer great mental and physical pain and incur large expense in attempting to remedy the injuries he received by the negligence and carelessness of the persons who had charge of him. Appellant answered, controverting the matter in the petition, and affirmatively set up that the hospital was a corporation and entirely independent of the railroad company, and the railroad company was not responsible for the acts or conduct of any of the persons in charge of it. Upon a trial of the case, a verdict was returned in favor of the appellee, and the railroad company prosecutes this appeal. The case is now before us on a petition for rehearing; the judgmnt of the lower court having been reversed by this court in an opinion which may be found in 88 S. W. 312, 27 Ky. Law Rep. 1193.

We gather from the record, and the principal opin-

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ion of this court, as well as a dissenting opinion found in 88 S. W. 312, 27 Ky. Law Rep. 1215, that the principal question litigated between the parties was whether or not the railroad company was liable at all; this court in the principal opinion saying: "There is no evidence showing that the Illinois Central Railroad Company made any contract with appellee, Buchanan, that he would be properly and skillfully treated by proper and skillful surgeons and attendants. The fact that the hospital association was organized for that purpose does not tend to prove that the appellant made such a contract with the appellee. The Illinois Central Railroad Company is simply the agent, and gathers the funds for the benefit of the hospital association, consequently for the benefit of its members. Doubtless the Illinois Central Railroad Company was indirectly benefited by its employes having proper and humane treatment at the hospital prepared for them; but that incidental benefit can not raise the question suggested, or make it liable for the act of the servant or agent of an independent corporation. Our conclusion is that the hospital corporation is a separate and distinct corporation from the Illinois Central Railroad Company, and that the latter has no financial interest in the result of its management, and in no way is it liable for the conduct of its directors, or physicians, or attendants at the hospital. The appellee is a member of the hospital association, and those in charge of it in part serve it and his interests, and he contributes to help pay the expenses of those performing that service and for the care and treatment of his associate employes. A peremptory instruction should have been given to the jury to find for appellant."

Upon a reconsideration of the questions at issue,

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we have reached a different conclusion from that announced in the opinion heretofore delivered. Although it may be true that the railroad company derives no personal or pecuniary benefit or gain from the conduct and operation of the hospital, yet it manages and controls it, and exacts from its employes sufficient funds to defray at least in part the expenses incurred in its operation. The employes thus contributing have the right to demand admission when injured in the service of the railroad company; but they have no voice in the selection of the physicians, surgeons, or other attendants in charge of the hospital. All of these persons are appointed by the railroad company; and, although the railroad company is not liable in damages for the negligence and carelessness of unskillfulness of any of its surgeons, phyicians, or attendants in charge in their treatment and care of the employes received into the hospital, yet it is obliged to exercise reasonable care in the selection of the persons who have charge of the patients; and, if it fails to select skillful and competent surgeons, physicians, and attendants, it may be required to respond in damages to any employe who has been injured by such incompetent or unskillful physicians, surgeons, or attendants. When the railroad company employs competent and skillful people, the measure of its duty to its employes is discharged. If these persons should be guilty of malpractice or other acts of negligence, the party injured by reason thereof must look to the individual causing the injury, and not to the railroad company. This view of the duty and obligation of the railroad company is fully supported by the opinion in Louisville & Nashville Railroad Company v. Foard, 104 Ky. 456, 47 S. W. 342, 30 Ky. Law Rep. 646, where an employe

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sought to recover damages from the railroad company for the negligent manner in which the physicians furnished by it treated his wounds. The court said: "The appellant was in no way responsible for the acts of the physician, or for his neglect of appellee, unless it be shown that appellant was careless and negligent in his selection, and that he was incompetent. In the employment by a railroad company of its surgeons to attend to persons injured by its trains, the relation of master and servant, principal and agent, does not exist And, if the railroad company is careful and selects suitable surgeons, it is not responsible for their neglect or malpractice. There is no pretense that appellant was careless or negligent in the selection of this physician and surgeon, or that he was in any way incompetent, and the court should not have permitted appellee to prove the misconduct, neglect or maltreatment of the physician." In Union Pacific Railroad Company v. Artist, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581, the same rule is announced in a strong opinion by Judge Sanborn, who said: "It would be a hard rule, indeed, a rule calculated to repress the charitable instincts of men, that would compel those who have freely furnished such accommodations and services to pay for the negligence or mistakes of physicians or attendants that they had selected with reasonable care. No such rule has ever prevailed in this country. The rule is that those who furnish hospital accommodations and medical attendants, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ; but are responsible only for their own want of ordinary care in selecting them." The doctrine

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announced in these cases is in harmony with the current of authority upon the subject, and seems to us to be sound in principle. As the selection or appointment of persons in charge of the hospital is lodged entirely in the railroad company, they should be charged with the duty of exercising reasonable care in their selection, and held responsible for a failure in this respect. But, when they have in the exercise of reasonable care employed competent and skillful physicians and attendants, it would seriously interfere with the establishment of institutions of this character to hold them responsible for every specific act of malpractice or negligence that they might be guilty of. Of course, this view is based on the assumption that the railroad company does not derive any pecuniary profit or gain from the conduct of the institution. If such were the case, a different standard of responsibility would be established.

In addtion to the instructions given on the former trial, the court on another trial of the case should instruct the jury in substance that, if they believe from the evidence that the railroad company or its agents selected or appointed the physicians, surgeons, or attendants at the hospital, then it was its duty to exercise reasonable care in selecting and appointing persons competent and skillful in the profession or business for which they were employed, and, if it failed to exercise reasonable care and skill in this respect, and Buchanan was injured by reason thereof, they should find for him.

Either party should be allowed to file such amended pleadings as may be necessary to fairly present this new issue.

The former opinion of this court is withdrawn, and the judgment of the lower court is reversed, with

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directions for a new trial in conformity with this opinion.

CASE 35.—ACTION BY R. H. EDELEN AND OTHERS AGAINST W. B. SAMUELS & CO. TO ENFORCE SPECIFIC PERFORMANCE OF A CONTRACT.—June 25.

Edelen, &c., v. Samuels & Co.

Appeal from Nelson Circuit Court.

SAMUEL E. JONES, Circuit Judge.

From a judgment sustaining a general demurrer to the petition, plaintiff appeals.—Affirmed.

1. Specific Performance — Grounds of Relief — Inadequacy of Other Remedy.—The right to a decree of specific performance of a contract relating to realty or personalty is based on the fact that damages for a breach cannot be adequately compensated at law.
2. Same—Discretion of Court.—The discretion of the court in granting or refusing the remedy of specific performance of a contract is not an arbitrary, but a legal, discretion.
3. Same—Contracts Enforcible.—A contract for the sale of the product of a distillery for five years, with the privilege of the buyer to buy the product for an additional period of five years, according to conditions specified in an instrument, binding the distiller to manufacture a specified number of barrels during each distillery season, with the option of the buyer to require an additional number, and to establish and maintain a bottling room suitable for bottling in bond the product of the distillery as may be required by the buyer, etc., will not at the suit of the buyer be specifically enforced because of the difficulties of performance, and because of the adequacy of the remedy at law for damages for a breach.

JOHN S. KELLEY for appellants.

GEO. S. & JNO. A. FULTON of counsel.

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POINTS AND AUTHORITIES.

1. The contract is valid and binding because it is alleged that the appellee corporation executed it, which is confessed by the demurrer.

2. Courts of equity will decree the specific performance of contracts respecting personalty as well as realty if no adequate and correct compensation can be made in damages. Pomeroy's Specific Performance, 2d ed., p. 8, note 3, same page, and pp. 9-11-13; Merwin's Principles of Equity, secs. 5, 6.

3. Contracts for the delivery of goods will be specifically enforced where the deliveries are to be made and purchase price paid through a number of years, they differ from those contracts that are to be immediately executed. Pomeroy, sec. 15, p. 20, note 2 to 15; Buxton v. Leister, 3 A. T. K., 384; Ball v. Coggs, 1 Bro. P. C., 140; (Tom 1st ed.), Chamberlin v. Blue, 6 Black, 491.

4. The right to specific performance of a valid contract depends upon circumstances, conditions and incidents and the discretion of the chancellor is not arbitrary. Pomeroy's Specific Performance, sec. 36, p. 52; sec. 38, p. 57; Merwin's Principles of Equity, secs. 64, 65, 66.

5. Where the questions are numerous issues complex, damages, uncertain or inadequate a court of equity only can give adequate and complete relief, and will enforce the specific performance of the contract. Pa. R. R. Co. v. St. L., etc., R. R. Co., 118 U. S., 187; Schmidt v. L. & N. R. R. Co., 101 Ky., 411; Joy v. St. Louis R. R. Co., 138 U. S., 1; Franklin Tel. Co. v. Harrison, 145 U. S., 459; Prospect Park & Coney Island R. Co. v. Coney Island & Brooklyn R. Co., 26 R. A., 610; Union Pacific Ry. Co. v. Chicago M. & St. Paul R. Co., 163 U. S., 564.

6. The various covenants in the contract are sufficient consideration for the optional agreement for sale of distillery plant: Bacon v. Ky. Central Ry. Co., 95 Ky., 375.

NAT W. HALSTEAD for appellee.

JOHN W. LEWIS of counsel.

1. The paper claimed to be a contract is not the act or deed of appellee, and is therefore not a contract in the law, because said paper was not executed in the manner and mode provided by the statute law of the Commonwealth of Kentucky governing and controlling private corporations in the conduct of their business.

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2. Appellants are not entitled to a judgment for specific performance of the contract relied upon, because it is an option contract; and an option contract can not be enforced by a court of equity because of a want of mutuality of obligation.

3. A court of chancery will not undertake to frame a decree of specific performance of a contract, and cannot do so, where it involves a continuous and long series of acts running through a long term of years, requiring the exercise of supervision as to all the matters, and requiring special skill and knowledge, and repeated examinations and due directions, such as would be required in the enforcement of the contract in the case at bar, in the operation of a distillery and manufacture of whisky, covering the many and varied provisions contained in the contract in controversy.

4. A court of equity will not decree the performance of an illegal act or of an unlawful contract.

5. Because of the fact that the court could not decree a specific performance of this contract as against the appellants, the court will not, and ought not, by injunction as against the appellee, grant what is termed negative relief to the appellants, because of the want of mutuality in the contract.

AUTHORITIES CITED.

Hudson, etc. v. Scottish Union & National Insurance Co., 23 Ky. Law Rep., 116; Miller, etc., v. McConnell, etc., 26 Ky. Law Rep., 181; Ky. Stats., secs. 542, 566, 551; Mason & Foard Co. v. Metcalfe Mfg. Co., 44 S. W., 629; American Wire Nail Co. v. Gege, 96 Ky., 521, 522; Morawetz on Private Corporations, 2d ed., secs. 337, 579; Litz et al. v. Hammon Goosling and wife, 21 L. R. A., 127; Page on Construction of Contracts, sec. 1112, vol. 2; vol. 3, sec. 1607; Pomeroy's Equity Jurisprudence, vol. 6, secs. 769, 757, 754; Welty v. Jacobs, 40 L. R. A., 98; Fry on Specific Performance of Contracts, 3 ed., secs. 440, 69; Page on Contracts, vol. 3, sec. 1633; Stanton v. Singleton, 47 L. R. A., 334; U. S. Stats.; High on Injunctions, 4th ed., vol. 2, sec. 1109a.

OPINION OF THE COURT BY JUDGE BARKER—Affirming.

This action was instituted in the Nelson circuit court for the specific performance of the following

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contract, which, although long, we consider necessary to set forth in full:

"Samuels, Ky., Nov. 29, 1906.

"This writing witnesseth that W. B. Samuels & Co., Incorporated, of Nelson county, state of Kentucky, have this day employed and do hereby employ, constitute and authorize T. G. Gilmore & Co., Incorporated, of Louisville, Ky., to make a contract for and on its behalf, for the sale of its distillery property at Samuels Depot, in Nelson county, Kentucky, and twelve hundred and sixty-six barrels of whisky at a price of 30 cents per proof gallon, original guage, the purchaser to take and pay for same, not less than 200 barrels each and every two months from the date of sale, and the cost of carriage additional after the date of sale to be added to the price. To sell two thousand barrels to be manufactured at said distillery during each and every distillery season from this date, with an option to the purchaser to take, and require to be made for him, one thousand barrels additional each season if he requires, or any portion thereof, for a period of five years from this date, and the purchaser to have the privilege of renewing this contract and extending same for an additional period of five years, provided he gives notice of his intention to renew the contract on or before the 1st day of July next preceding the date of expiration of the first five-year period. The price of the said whisky to be hereafter manufactured to be twenty-five (25c) cents per proof gallon, based on corn at 45 cents per bushel in Louisville, as shown by bills for same, and in the event that the price of corn should advance, the price of the whisky to be increased one-quarter of a cent per gallon for each cent advance per bushel in corn above 45 cents, and if corn declines, the price of the

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whisky to be reduced one-quarter of a cent per gallon for each cent decline in the price of corn below 45 cents. The whisky manufactured hereafter to contain 30 per cent of small grain, and to be sound and merchantable. If, during any season, the price of corn should exceed 75 cents, then no whisky is to be made except at the option of the purchaser, but the full amount shall be produced during the life of this contract in such amount each season as the distiller can produce, but not exceeding 3,000 barrels per season, except at distiller's option. Cooperage to be first class, eight or ten-hoop barrels, and the distiller to deliver the whisky as required, f. o. b. cars at Samuels, Ky. Outs to be guaranteed not to exceed one gallon per month. Goods to be paid for on the 10th of each month succeeding the month of manufacture on delivery of warehouse receipts. Buyer to have option of having a portion of each crop made in such name or names as he may designate other than W. B. Samuels & Co., and buyer is to have the brand of W. B. Samuels placed on any or all of the whisky made under this contract at his option. Said W. B. Samuels & Co. is to establish and maintain a bottling room suitable for bottling in bond, suitable to meet the requirements of purchaser in bottling the whiskies of said distillery, and said bottling house must be established without delay, so as to take care of any orders buyer may give for the bottling of any whiskies now in the W. B. Samuels & Co. warehouses which buyer may purchase on the market. Purchaser is to furnish, for bottling in bond at Samuels, Ky., all cases, bottles, corks, labels, etc., without cost of W. B. Samuels & Co., and W. B. Samuels & Co. is to furnish labor in bottling said goods, and charge for same as follows: 'Half pints, 60 cents per case; pints, 40 cents per

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case; fives, 25 cents per case; fours, 25 cents per case.'

"Also to sell the distillery plant and lands containing about 14 acres, more or less, at Samuels Depot, in Nelson county, Kentucky, being all the lands owned by said W. B. Samuels & Co., together with the distillery warehouses and all other improvements, buildings, fixtures, and machinery thereon; also all brands, good will, etc., for a consideration of $25,000.00, excluding, however, accrued storage up to time of transfer of said property and personal property consisting of barrels, barrel material, grain, coal, etc. The purchaser of the whisky under any contract which may be made by said T. M. Gilmore & Co. to have the option to purchase said distillery at the end of the first five-year period, or if contract is extended for an addition five years, then the purchaser to have the option to purchase said distillery plant and premises at said price at the end of the second five-year period. Said W. B. Samuels & Co. agree to make a deed of general warranty to the purchaser except as to the lien in favor of the United States Government. Said W. B. Samuels & Co. agree to pay, in the event of this sale, to T. M. Gilmore & Co., a commission of fifty cents per barrel on each and every barrel of whisky taken by purchaser under this contract, said commission to be paid as goods are delivered and paid for, and in the event that the purchaser, in the exercise of his option, takes the distillery, it is to pay a commission to T. M. Gilmore & Co. of five (5%) per cent when deed is made and notes are given or cash paid. In case distillery is destroyed, W. B. Samuels & Co. is not to be required to fulfill this contract, but in the event it should rebuild the distillery, then it shall perform the contract with the successors or assigns of persons with whom same may be made.

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This option limited to five days from date of this paper.

'(Signed) W. B. Samuels & Co.,
By M. A. Samuels, Pres. 'T.'"

"We hereby agree to take the whisky mentioned in this writing at the prices and on the terms and conditions, and with the options contained therein, including the option to purchase the distillery plant and lands mentioned.

"(Signed) R. H. Edelen & Co.

"Bardstown, Ky., Nov. 29, 1906."

"This writing, made on this the 30th day of November, 1906, by and between T. M. Gilmore & Co., Incorporated, as agent of W. B. Samuels & Co., Incorporated, of Nelson county, Kentucky, of the first part. and R. H. Edelen & Co., that is, R. H. Edelen and John S. Kelley (partnership), of the second part, witnesseth: That the said T. M. Gilmore & Co., as agent aforesaid, has, in pursuance to the power and authority vested in it by writing, signed by W. B. Samuels & Co., of date November 29, 1906, and accepted by R. H. Edelen & Co., in writing at the foot thereof and signed by R. H. Edelen & Co., and which is hereto attached and made part hereof, marked 'W. B. S. Co.,' sold to said R. H. Edelen & Co. all the whisky mentioned in said writing, including the product of said distillery for five years from this date, and authorized to be sold by said writing of date November 29, 1906, marked 'W. B. S. & Co.,' on the terms and conditions and stipulations therein, with all the privileges and options mentioned in said writings, including the option and privilege to said second parties to extend the contract for the purchase of the product of said distillery for an additional period of five years upon the same terms and conditions and

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with the privileges and options to said second parties to purchase the said distillery property at the prices and on the terms and conditions mentioned in said writing, either at the end of the first five-year period, or at the end of ten years from this date, and said R. H. Edelen & Co. hereby agree and accept said whisky and pay for the same on the terms and conditions and with all the rights and privileges and options in said writing mentioned as fully as if set out herein at length, and agree to do and perform all the obligations and acts imposed upon them as purchasers thereof under said writing of November 29, 1906. Witness our hand the day and year first above written.

"(Signed) T. M. Gilmore & Co.,
"R. H. Edelen & Co.,
"By John S. Kelley."

To the petition, which sought a decree enforcing a specific performance of the foregoing contract, a general demurrer was interposed and sustained. The plaintiffs declining to amend, the petition was dismissed, and they are here on appeal.

It may be assumed that there are no questions of technicality of pleading involved, and that the contract sued on, which is made a part of the petition, is a valid and subsisting contract between the parties. The question raised by the demurrer is whether or not the chancellor should adjudge a specific performance of its terms. It will be observed that the contract involved here, if specifically enforced by the chancellor, will require the court's constant attention for a period of at least five years, and at the option of the appellants, ten years. In order to make the whisky contemplated by the terms of the instrument before us, the court will be forced to purchase a large

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quantity of grain and other material necessary to the distillation of the spirits to be delivered; also to erect a bottling works, and be prepared to bottle the whisky after it is made. There is no fundamental distinction between contracts involving realty and those involving personal property, in so far as the remedy of specific performance is concerned. The right to a decree of specific performance of a contract is based upon the equitable principle that the ordinary common-law remedy of damages for a breach will not afford a full and adequate remedy for the injury arising from the failure to carry out its terms. It is true that generally mere damages will more uniformly be found to fail as an adequate remedy in contracts relating to realty than those relating to personalty; yet, where the specific enforcement of a contract concerning personalty is practicable, and the remedy sounding in damages is found to be inadequate, the chancellor will just as readily enter a decree for its specific performance as he will in a contract concerning real property. And, while the remedy of specific performance is generally spoken of as resting in the discretion or grace of the chancellor, this is more a form of expression than of accurate definition of the rights of the injured party as to his remedy by specific performance. In other words, while the chancellor has a discretion, it is not an arbitrary, but a legal discretion. Holding these principles in mind, we will now examine some of the authorities relating to the subject in hand.

Pomeroy, in his work of Specific Performance of Contracts, in enumerating the class of cases where a specific performance will be denied because it is impracticable, says:

"Sec. 307. Contracts having such terms and pro-

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visions that the court is unable to carry into effect its decree for a specific performance. In this class of agreements, which is by far the most numerous and important, the jurisdiction is declined, not because it is impossible to formulate a decree which shall order everything necessary for a complete performance, nor even because a compulsory execution of such decree is absolutely and in the nature of things impossible, but because the enforcement of the decree would unreasonably tax the time, attention, and resources of the court, and thereby interfere too much with its public duties towards other suitors, and in the general administration of justice. Take the case, which is the extreme one, of a contract for the construction of an extensive line of railway. It is plain that a court of equity can render and put into a proper form a decree ordering the specific execution of this contract with about the same ease that it can make a decree ordering the execution and delivery of a deed of conveyance with the requisite covenants and other provisions. It is also plain that by means of a comprehensive and minute scheme of operations prepared by experts, and by the help of special masters overseeing the work and reporting its progress from time to time, the court might enforce this decree, although months, or even years, should be required for its completion; but to do so would occupy the care, attention, and time of the court, to the exclusion of other matters, and to the manifest detriment of the public business. A judicial tribunal cannot thus sacrifice the interests of other suitors, and even of society, for any benefit which might accrue to individual parties. For this reason, rather than from any inherent and absolute impossibility, equity refuses to exercise its jurisdiction under such circumstances. In

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some cases, however, of special and exceptional contracts properly belonging to this class, where the inconvenience would be comparatively slight, and where its interference is demanded by well-settled principles, equity does exercise its jurisdiction and decree a specific performance. The followng are the important species of agreement in respect of which the remedy is generally declared to be impracticable:

"Sec. 308. A continuing covenant will not be negatively enforced by an injunction restraining its breach, when the acts alleged to be in violation of it are numerous, and each one of them would require a separate judicial examination—perhaps an action at law—in order to ascertain whether it constituted a breach or not, and where the same controversy would arise with respect to every violation of the injunction, as, for example, a covenant not to sell water from a certain well to the plaintiffs injury. In such a case each alleged breach would require a separate controversy of fact. An injunction, in the very terms of the covenant restraining 'sales to the injury of the plaintiff,' would not remove the difficulty, because the same question would arise upon every breach of it, viz., whether the plaintiff was in fact injured, and an injunction restraining all sales would be broader than the covenant. The same obstacles would arise in the way of negatively enforcing every other covenant or agreement of the kind described."

"Sec. 310. The instances embraced in the two foregoing subdivisions are rare. Those which follow are of constant occurrence. Contracts for personal services, where the acts stipulated for require special knowledge, skill, ability, experience, or the exercise of judgment, discretion, integrity, and the like personal qualities on the part of the employes, or where

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the services are confidential, in short, wherever the full performance, according to the spirit of the agreement, rests in the individual will of the contracting party, courts of equity have no direct and efficient means of affirmatively compelling a specific execution. At most, they could only order the acts to be done and punish the defendant refusing by fine or imprisonment."

The case of Marble Company v. Ripley, 10 Wall (U. S.) 339, 19 L. Ed. 955, involved the specific performance of a contract with reference to the quarrying of marble, and the court thus laid down the rule in regard to the specific performance of a contract somewhat similar in principle to that we have here: "Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties it requires of the owners of the quarries. These duties are continuous. They involve skill, personal labor, and cultivated judgment. It is, in effect, a personal contract to deliver marble of certain kinds, and in blocks of a kind, that the court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed quality of marble has been delivered, but whether every block was from the right place, whether it was sound, whether it was of suitable size, or shape, or proportion. Meanwhile the parties may be constantly changing. The marble company are liable so long as they hold the land, and Ripley's rights exist only while he holds the mill. It is manifest that

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the court cannot superintend the execution of such a decree. It is quite impracticable. And it is certain that equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder." To the same effect are the cases of Port Clinton Railroad Company v. Cleveland & Toledo Railroad Company, 13 Ohio St. 544; Beck v. Allison, 56 N. Y. 366, 15 Am. Rep. 430, and Bomer Bros. v. Canaday, 79 Miss. 222, 30 South. 638, 55 L. R. A. 328, 89 Am. St. Rep. 593. In 26 Am. & Eng. Encyc. of Law (2d Ed.) p. 102, it is said: "The general rule is that equity will refuse to decree specific performance of a contract for personal services involving the exercise of skill, judgment, taste, or discretion, particularly if the terms of the contract or the nature of the services to be rendered are vague and uncertain, or if the contract is to continue through a considerable period of time, and would require the constant supervisions of the court."

It may be conceded that the broad rule we have laid down has been somewhat narrowed in favor of the specific performance of contracts relating to the operation of quasi public corporations, such as steam railroads and street railways. Of these last the case of Schmidtz, etc., v. Louisville & Nashville Railroad Co., 101 Ky. 441, 19 Ky. L. R. 606, 41 S. W. 1015, is a fair example. But we conceive that the rule established by the authorities hereinbefore cited has not been modified further than in those cases wherein the general public has an interest; and certainly the rule has not been modified so as to embrace within the class of those contracts which will be specifically enforced such an one as that before us. It seems to us if there is any contract which will not be specifically enforced because of the impracticability or difficulty in framing a decree

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therefor, such a one we now have under consideration. At the very outset, if the court undertook, through its commissioner, to carry it into effect, it would be obliged, as said before, to raise a large sum of money for the purchase of material and the construction of a bottling establishment. As the court would have no money, of its own, this would necessarily have to be borrowed from the banks or other money-lenders, notes would have to be executed, and their payment or renewal arranged for, great skill would have to be exercised in purchasing, setting up, and operating the machinery required to carry into effect the covenant relative to the bottling establishment, great commercial foresight and acumen would be involved in the purchase of grain and other material necessary to carry out the contract; and then the distillation of the liquor would require a technical skill and knowledge which the court, not possessing, would have to employ. Many nice and intricate questions would arise as to whether or not the whisky distilled was or not made in accordance with the terms of the contract; and at every stage of the procedure difficulties would be encountered which, as between individuals, might result in lawsuits. Suppose the plaintiffs should claim that the whisky manufactured by the court was not up to the contract standard, or that the barrels furnished by it leaked to a greater extent than allowed by the outage covenanted in the contract. How would these various questions be settled? Then, too, in the distillation of whisky, the court and its officers would necessarily, to a large extent, be in the hands of the federal revenue officers, who would take charge of the liquor and control it, to the exclusion of the court and its officers, and a mere technical violation of the United States revenue laws, or even a

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claim of such violation, might result in the court and its officers being prosecuted under the criminal laws of the United States relating to the distillation of spirituous liquor. Nor is it a strained supposition that the chancellor might have scruples as to being engaged in the distillery business under any circumstances. But it is not necessary to seek further for examples of the many difficulties, not to say impossibilities, lying in the path of a specific performance on the part of the court of the contract in question. It seems to us they are insurmountable.

Nor can the contract be enforced by the process of fine against the recalcitrant defendant. It would be impossible for the court to know, or to ascertain certainly, whether or not it was in default if there was a complaint of a failure on its part to live up to the contract in its true meaning or intent. The chancellor has no special knowledge by which he could say whether or not the whisky was properly distilled, or whether proper proportions of the different grains were used, or whether the bottling was in accordance with the contract, or the barrels sufficiently secure to keep within the outage clause.

On the other hand, it does not seem to us that the plaintiffs have not an adequate remedy in a suit at law for a breach of the contract. There may be some difficulty in producing the evidence to enable a jury to award the proper amount of damages; but this can be overcome by diligence and care, and certainly it cannot be said that it is impossible to ascertain the real amount of damages which the plaintiffs may sustain by reason of the alleged breach of the contract. But, be this as it may, it will better subserve the ends of justice that the plaintiffs should endure the difficulty of proving to a jury the extent of their injury in

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an action at law, than that the court should be drawn into the financial hazard of operating a large distilling plant for a long period of time, and be constantly confronted with intricate and difficult problems of expediency in successfully maintaining its venture, not to speak of having its time and attention almost entirely monopolized by the problems arising in one case, to the exclusion of the interests of the various other litigants with cases pending in the court.

For these reasons, we are constrained to the conclusion that the trial judge correctly sustained the general demurrer to the petition, and his judgment is therefore affirmed.

CASE 37.—ACTION BY CLEMANTINE DESHON AND OTHERS AGAINST JAMES A. HOLT'S EXR. AND TRUSTEE INVOLVING A CONSTRUCTION OF DECEDENT'S WILL.—June 26.

Holt's Exr. v. Deshon, Etc.

Appeal from Franklin Circuit Court.

R. L. STOUT, Circuit Judge.

Judgment for plaintiffs. Defendant appeals.—Reversed.

1. Perpetuities—Suspension of Power of Alienation.—A devise of land to two devisees, upon the condition that devisees shall reside on the farm, the farm never to be sold, leased, or rented, no blue grass field to be plowed, no stock to be pastured except such as is owned by the devisees, and no tobacco to be raised, but that, should either of the devisees die without leaving issue, then her share to go to the sur-

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viving devisee, and should both die without leaving issue, then the land to go to a third person, was not void as creating a perpetuity; the limitations being only upon the land while held by the devisees first named.

2. Wills—Devise Subject to Payment of Money—Lien.—Under Ky. Stats., 1903, Sec. 2066, providing that, when any property shall be devised subject to the payment by the devisee to another of a sum of money, the latter shall have a lien on the legacy for the sum so to be paid, where a will provided that, should either of two devisees die without leaving issue, then her share should go to the surviving devisee upon payment by her to the husband of the deceased devisee of a sum named, the husband of the deceased devisee had a lien upon her share of the land to secure the payment of the sum named.

3. Same—Devise on Condition—Reasonableness.—While devisees of land on condition that they shall reside thereon must make it their residence, a temporary absence is not a ground of forfeiture.

ERNEST MACPHERSON for appellant.

FIDELITY TRUST CO. as Admr., etc.

GEO. A. BRENT of counsel.

CLASSIFICATION OF POINTS AND AUTHORITIES.

1. Under the second codicil of the will of James A. Holt the conditions were really limitations.

"Where there is a devise upon a condition, and the estate is devised over to a stranger upon the breach or non-performance of the condition, that condition is usually construed to be a limitation." (Chan. Walworth, in Fox v. Phelps, 20 Wend., 437.) See also Battle Square Church v. Grant, 3 Gray, 142; 63 Am. Dec., 727; Clark v. Calloway, Snead, 46; Coppage v. Alexander, 2 B. M., 316.

2. A limitation determines the estate absolutely, whatever be its nature: Smith v. Smith, 23 Wis., 176; 99 Am. Dec., 153, quoting Greenleaf's Note to Cruise on Real Property.

3. Under the second codicil of Holt's will the appellees took at the utmost only a defeasible fee, and probably a life estate with remainder to their issue living at the time of their deaths: Dorsey's Comm. v. Maddox, 103 Ky., 253; Armstrong v. Armstrong, 14 B. M., 277.

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4. The Kentucky Statutes, Sec. 2360, which is really the rule against perpetuities, could not be construed to be violated by any of the provisions of the second codicil of the will of James A. Holt. The use of the word "never" applied only to the life tenants, "said devisees," that is, the appellees. See Morton's Gdn. v. Morton, 27 Ky. Law Rep., 662; J. M. Robison v. Fred Gray (recent case not reported, decided by Judge Carroll).

5. The adjudication by the Franklin circuit court that the $15,000 to be paid to the husband of the sister first dying was a charge upon the corpus of the estate was error, because by the express terms of the second codicil it is made a personal charge, if a charge at all, upon the surviving sister.

Ky. Stats, Sec. 2066, in relation to charges upon estates, relates only to express charges and cannot be invoked in aid of the judgment below.

6. Even if the limitations should be construed as conditions pure and simple, they were valid because:

(a) The weight of authority sustains the validity of a condition requiring the devisee to reside on the premises: Irvine v. Irvine, 12 Ky. Law Rep., 827; Dale v. Atkinson, 3 Jur (N. S.), 41; Woods v. Townley, 11 Hare, 314; Lowe v. Cloud, 45 Ga., 481; Marston v. Marston, 47 Me., 495.

(b) That the farm is never to be sold, leased or rented is also valid merely as a condition: Morton v. Morton and Robison v. Gray, above quoted, and Attorney General v. Wallace, 7 B. M., 611.

(c) Mere conditions and limited restraints upon the sale of a pure fee simple even have often been upheld in Kentucky, if such restraints do not exceed the statutory period of restraint: Stewart v. Barrow, 7 Bush, 370; Kean v. Kean, 13 Ky. Law Rep., 956; Wallace v. Smith, 113 Ky., 263; see also DePeyster v. Michael, 6 N. Y. (2 Selden), 467; Nichols v. Eaton, 91 U. S., 725; Berry v. Berry, 15 Ky. Law Rep., 541; Best v. Conn, 10 Bush, 36; Camp v. Cleary, 76 Va., 140; Minor's Institutes, vol. 2 3d ed., p. 272.

JOHN W. RODMAN for appellees.

LIST OF AUTHORITIES REFERRED TO IN BRIEF OF APPELLEES.

1. On defeasible fee: Collins v. Thompson, 19 Ky. Law Rep., 1194; Lee, etc., v. Munford, etc., Ky. Law Rep., vol. 19, p. 1585; Dorsey's Committee v. Madden, 19 Ky. Law Rep., 1903.

2. Restraint on alienation: Encyclopedia of Law, vol. 22, p. 704; Redfield on Wills, vol. 2, p. 288, subsection 13, also subsection 14, p. 288; also p. 289; section 37, 229;

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Henry Pardew v. Robert Gibbons, Jones Equity, vol. 1, p. 306, N. C. Rep.; Stansberry v. Hubner 73 Maryland, 228; Hepziber admx. v. Turrell Tufts, 18 Pick, 455; Moore v. Sanders, 15 South Caroline, 441; Farris, etc., v. Rodgers' Guardian, 9 Ky. Law Rep., 913; Ludwig v. Combs, 1 Metcalf, 128; Attorney General v. Wallace's Devisees, 7 B. Mon., 611; Stevens v. Stevens, 21 Ky. Law Rep., 1315; Fidelity Trust Co. v. Loyd, 25 Ky. Law Rep., 1827; Coleman v. Coleman, 23 Ky. Law Rep., 1477.

3. Limitation over upon an indefinite failure of issue is void for remoteness: Encyclopaedia of Law, 2d ed., vol. 6, p. 515, vol. 17, p. 558, vol. 17, p. 563; Moore's Trustee v. Howe, 4 T. B. Mon., 202; Brashier v. Macey, etc., 3 J. J. Marshall, 91; Shephard v. Shephard, 2 Richardson S. C. Rep., 142; Tater v. Tater, Barbour's Supreme Court Rep., vol. 4, p. 431; Cox v. Buck, Richardson's Law Rep., vol. 5, p. 604; Farris v. Gibson, 4 Edward Chancery Rep., 710; Ky. Stats., sec. 480; Morton's Guardian v. Morton, 27 Ky. Law Rep., 664; Robinson v. Gray, 29 Ky. Law Rep., 1296.

4. Conditions in will against public policy: Walker and wife v. Vincent, 19 Pa. St. Rep., 371; Brattle Square Church v. Grant, 63 A. M. D., 737.

5. $15,000.00 charge on land: Ky. Stats., sec. 2066; Percey, etc., v. Greenwell, etc., 80 Ky., 616.

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

The will of James A. Holt contains, among other things, these provisions: "I give, devise, and bequeath to my two cousins, Clara Clark and Clementine Deshon, my farm in Franklin county, State of Kentucky, a description of which is on record in Deed Book No. 16, page 237, etc., of the records of the said Franklin county (in the city of Frankfort), together with all the furniture in my house, except such as I may retain for my own use, stock and farming implements, including all the personal property on said farm, said farm containing about seven hundred and fifty acres, upon the following conditions: Said devisees shall reside on said farm, said farm is never to be sold, leased or rented, no blue grass field is to

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be plowed, no stock to be pastured on said real estate except such as is owned by said devisees, and no tobacco is to be raised on said real estate. Should either of said devisees die without leaving issue, then her share shall go to the surviving devisee, a sister, upon the payment by said survivor to the husband of said decedent of fifteen thousand dollars, and should each of said devisees die without leaving issue, then said real estate shall revert to Clarke Lodge, No. 40, Free and Accepted Masons, of Jeffersonville, Indiana, and a further consideration: I am to have care and attention during my life at said farm, if I desire it. A failure to comply with the conditions herein set out shall revoke this codocil and said real estate shall revert to the aforesaid Lodge and is bequeathed with full power and authority to sell." The Fidelity Trust Company qualified as the executor and trustee under the will. This suit was brought by Mrs. Deshon, Mrs. Clark, and their husbands against the trust company as administrator and trustee and Clark Lodge No. 40. The plaintiffs assailed the limitations in the will as creating a perpetuity and therefore void. They also asked a construction of the will as to the $15,000 to be paid the husband of the devisee dying without issue leaving the other surviving her. The circuit court adjudged the limitations in the will were void as creating a perpetuity, and also adjudged that, if Clara Clark or Clementine Deshon should die without leaving issue, then her share should go to the surviving devisee upon the payment by her to the husband of the deceased sister of the sum of $15,000; that the $15,000 is a charge upon the estate devised; and that the husband of the deceased sister, on the happening of that event, will have a lien upon the farm to secure the payment of the money. He also

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adjudged that, in the event that Mrs. Deshon and Mrs. Clark died without leaving issue, the farm would revert to the trust company, as trustee under the will, for the benefit of the lodge. It was shown in the record that the land on the farm, which has heretofore been in blue grass, is being taken by weeds, shrubs, bushes, etc., so much so as to destroy the value of the field as a blue grass pasture, and that this state of case exists as to at least 500 acres of the land; and it is insisted that the devise to Mrs. Deshon and Mrs. Clark, with the limitations put upon it, is a burden rather than a benefit. They have taken possession of the land since the testator's death, but neither of them have any children.

As to the validity of the limitation in the devise being valid or invalid depends upon the construction of the language used. The words are these: "Said devisees shall reside on said farm, said farm is never to be sold, leased or rented, no blue grass field is to be plowed, no stock to be pastured on said real estate except such as is owned by said devisees, and no tobacco is to be raised on said real estate." The words "said devisees" evidently refer to Clara Clark and Clementine Deshon. The limitation is only, therefore, that they shall reside on the farm and that no stock is to be pastured on it, except such as is owned by them. While the other words do not in terms refer to them, we think it evident that the testator, when he provided that the farm was never to be sold, leased, or rented, and that no blue grass field was to be plowed and no tobacco was to be raised upon the land, had in mind only a limitation upon the estate before the contingency introduced by the next succeeding words, "Should either of said devisees die without leaving issue." In other words, all these

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limitations are only placed upon the estate while it is held by Mrs. Clark and Mrs. Deshon. If either of them dies leaving issue, the issue will take the land absolutely and free from all limitations; but, if they both die without issue, it then goes to the lodge as provided below. A limitation upon Mrs. Deshon and Mrs. Clark as to how they should use the land is not in violation of the statute against perpetuities. The property belonged to the testator, and, when he devised to them a limited estate in it, he had power to fix such limitations upon the estate granted as he saw fit. Their estate is not absolute, and the question as to what limitations may be imposed upon the devise of a fee simple is not, therefore, presented. If either of them dies leaving issue, the issue can sell the land at pleasure and use it as they please. But the testator, when he did not give Mrs. Clark and Mrs. Deshon the absolute fee, might put such limitations upon them as he deemed proper for the preservation of the estate for those who are to come after them. We think, therefore, that the circuit court erred in holding the limitations above quoted void.

Section 2066, Ky. St., 1903, is as follows: "When any property shall be devised subject to or upon the payment by the devisee to another of a sum of money or his doing some other thing, the latter shall have a lien on the legacy for the sum so paid, or for the value of the thing to be done." It is provided by the will that, should either Mrs. Clark or Mrs. Deshon die without leaving issue, then her share shall go to her surviving sister upon the payment by her to the husband of her sister of $15,000. It will thus be seen that the share of the one dying without issue is devised to the survivor upon the payment by the devisee to another of a sum of money. In other

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words, the share of the one dying without issue is devised to the surviving sister. She therefore in that event will take this share under the will, but by the provisions of the will will take it upon the payment by her to the husband of the sister of $15,000. By the terms of the statute, therefore, the husband of the deceased sister will have a lien upon his deceased wife's share in the land for $15,000, if she dies without issue. He will not have a lien upon the whole farm, but a lien only upon the half of it which was devised to his wife. We do not mean to determine that Mrs. Clarke and Mrs. Deshon must remain actually on the land all the time in order to prevent the reverting of the devise. They must make it their residence, but they may be absent from the place for business or pleasure temporarily, provided they do not take up a permanent residence elsewhere. They may divide the land between them if they desire to do so; and, while the devise is not so valuable with the restrictions placed upon it, it is a property of great value, which, with fair management, will furnish them an admirable home.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

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CASE 36.—PROCEEDINGS TO DISBAR W. H. BECKNER, AN ATTORNEY AT LAW.—June 25.

Beckner v. Commonwealth

Appeal from Clark Circuit Court.

W. O. HARRIS, Special Judge.

From a judgment suspending him from practice for two years, he appeals. —Reversed.

Attorney and Client—Suspension of Attorney—Making False Affidavit.—An attorney at law who voluntarily made a false affidavit to be used in a judicial proceeding in which he was not acting as attorney could not be suspended from practice for that reason, since he was absolutely privileged to the same extent as any other witness from any punishment except a criminal prosecution for perjury.

WILLIAM LINDSAY, LEWIS APPERSON, McQUOWN & BROWN, JOUETT, BYRD & JOUETT, LUCIEN BECKNER and W. M. BECKNER for appellant.

GEORGE B. NELSON, N. B. HAYS, Attorney General, D. L. PENDLETON and CHAS. H. MORRIS for Commonwealth.

OPINION OF THE COURT BY JUDGE BARKER—Reversing.

This is a proceeding commenced in the Clark circuit court to disbar the appellant, an attorney, from practicing law in the state of Kentucky. It is based upon the following facts: In an action between Thomas G. Stuart and Archer Harman, in the Clark circuit court, Stuart obtained a judgment for a large sum of

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money against Harman. Harman left the State and engaged in business in various parts of the world, and is reputed to have made a large fortune in South America. He finally went to England, where Stuart instituted an action against him on his judgment in the Court of King's Bench, and sought by proceedings there to enforce it and collect his debt. It seems that under the law of England, if there be no reason shown against it, the collection of a foreign judgment may be enforced by a summary procedure. Harman undertook to balk this procedure instituted by Stuart against him by showing that the judgment had been unfairly or fraudulently awarded against him in Kentucky; or, in other words, that he had not had a fair and impartial trial. When the case between Harman and Stuart was pending in the Clarke circuit court, the appellant, William M. Beckner, was of counsel for Harman for at least a part of the time, and understood the issues between the parties litigant, the result of the trial, and the mode of procedure by which the judgment was obtained. In order to induce the Court of King's Bench to refuse to summarily enforce the Kentucky judgment against him, Harman obtained from Beckner the following affidavit to be read as evidence in his behalf:

"I, William Morgan Beckner, of the city of Winchester, in the county of Clark, state of Kentucky, in the United States of America, make oath and say as follows: (1) I am an American citizen, resident in the city and State aforesaid, am a lawyer by profession and have an office in said city. I am sixty-four years of age past. (2) I have known plaintiff, Thomas Goff Stuart, for a period of at least thirty-five years past, and during all that time said Stuart has been practically insolvent and hard pressed for

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money, and has now no estate of any kind known to me. (3) That from 1884 to 1892, A. D., defendant Archer Harman was frequently in Clark county, Kentucky, as said Stuart well knew. That he was a partner in a large contracting firm which built many miles of the Kentucky Union Railroad, a line of railroad that ran through said county, and was in active charge of the construction of a large section of said road. (4) That said Stuart takes an actice interest in politics in the state of Kentucky. (5) That this cause was first decided by the regular judge of the circuit court of Clark county, Kentucky, in favor of defendant Harman. That said judge, who was a very able lawyer and judge, held that said Stuart was not a partner of defendant Harman in the land deal in controversy, and that the judgment of said circuit judge was reversed by the court of appeals of Kentucky on said question chiefly because of certain letters introduced by said Stuart, but which said Harman by reason of his absence had no opportunity to see so as to determine whether or not they were authentic. (6) That the special judge by whom the judgment relied on in this court was rendered is the nephew of a prominent politician in Kentucky, and himself takes an active interest in politics and belongs to the same party to which Stuart is a member. (7) That plaintiff Stuart in the suit wherein said judgment was rendered was represented by several lawyers of power and influence who were spurred on by a contract for a contingent fee. (8) The defendant Harman lived in so many places in the prosecution of his business as a contractor that his papers had become scattered, and he was himself too far away to be able to assist his counsel in preparing said cause for said trial. (9) That by reason of the undue influence of plaintiff

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Stuart and his counsel and the absence of the defendant Harman from the United States and the state of Kentucky said defendant did not have a fair trial of said cause. William Morgan Beckner. Sworn to at Winchester, Kentucky, U. S. A., this 28th day of May, 1906. C. C. Page, Notary Public. Clark County, Kentucky.

"Before me, C. C. Page, Notary Public, Clark County. My commission expires October 8, 1908."

Upon the trial of this case below the court rendered a judgment finding appellant guilty as charged, and suspended him from the practice of his profession as a lawyer for a term of two years. From that judgment this appeal is prosecuted. The court's conclusion of the issue between the Commonwealth and appellant is thus stated: "The court's conclusion is that the affidavit in question in these proceedings was deliberately and cunningly drawn, so as to support a charge of fraud and unfairness in the trial of the case therein referred to, and that said charge was known to be wholly untrue by the affiant."

As we see it, the first question with which we are confronted is whether or not an attorney who is a witness in a judicial investigation may be prosecuted and punished for his testimony by such a procedure as we have before us. Appellant was not the attorney of Harman at the time he gave his affidavit. The action in which the testimony contained in the affidavit was to be used was pending in a judicial tribunal in England. Appellant was none the less a witness because his evidence was given voluntarily. We do not think it can be questioned that what one may be compelled by law to do he may do voluntarily. Suppose the appellant had been in England, and there summoned before the Court of King's Bench as

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a witness for Harman, and had deposed substantially as is contained in the affidavit copied above, could he then have been disbarred in Kentucky for his testimony in England? Or suppose a commission had issued from the Court of King's Bench for the taking of his deposition in Clark county, and he had been summoned before the proper officer and required to testify, would he then have been subject to disbarment because of his testimony? If so, then it must be conceded that an attorney summoned as a witness stands in a different attitude with reference to responsibility for his testimony than any other witness. It seems to us that the public policy which shields a layman who is a witness from all punishment except criminal prosecution for perjury if he bears false witness protects an attorney at law, who is a witness, to the same extent.

In the case of Sebree v. Thompson (opinion rendered June 19, 1907) 103 S. W. 374, we held, in an opinion written for the court by Judge Lassing, that a witness is absolutely privileged from any punishment except a criminal prosecution for perjury by reason of his testimony given in court in a pending cause. In the opinion a great many authorities are reviewed, and the rule above stated clearly announced and fully maintained. The principle is rested upon the broad public policy that witnesses should not be harassed except by prosecution for perjury because of their testimony in court. It is not necessary to reproduce the reasoning of the opinion, or the authority cited to sustain it. We deem it sufficient to say that it is conclusive of the question under discussion. In the matter before us there was a cause pending in a court of justice, and one of the parties called on the defendant to testify upon the issue joined. The

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party had a right to the testimony of the witness, and the latter had a right to give his testimony voluntarily without waiting for the process of the court to enforce it. This being true, the witness was not amenable to any other procedure or punishment except prosecution for the crime of perjury if he spoke falsely.

We deem it not inappropriate to say that there is nothing in this record that warrants any sort of adverse reflection upon the conduct of the learned trial judge who awarded the judgment against Harman, or the counsel who obtained it, or the Attorney General of the State, who is the relative of the trial judge referred to in the affidavit of appellant. All of these men are officers of this court, and are known to be incapable of striving for unworthy ends, or the practice of unworthy means. But this does not alter the principle that it is the policy of the law that a witness should go upon the witness stand untrammeled by the fear of prosecution by those who may be offended by or disappointed in his testimony.

For these reasons, the judgment is reversed, with directions to dismiss the proceeding against the appellant.

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CASE 38.—ACTION BY FANNY WARE AGAINST S. W. HAGER, AUDITOR, INVOLVING HER RIGHT TO A CERTAIN TRACT OF UNAPPROPRIATED LAND.—June 26.

Ware v. Hager, Auditor

Appeal from Franklin Circuit Court.

R. L. STOUT, Circuit Judge.

Judgment for defendant, plaintiff appeals.—Affirmed.

Public Lands—Lands Subject to Patent.—Ky. Stats., 1903, Sec. 4702, provides that each county in the State shall have the right to dispose of the unappropriated lands therein not otherwise provided for in the manner thereinafter directed. Sec. 4703 provides that an actual settler on any vacant or unappropriated land shall have a pre-emption right not exceeding 200 acres, and that any person wishing to appropriate any vacant land may obtain an order of court authorizing him to enter and survey not exceeding such amount. Sec. 3704 provides that the surveyor shall survey the entries, etc., bounding them by plainly marked trees, stones or stakes, and noting where they bind on a water course or a marked line of another survey. The boundary of the State extends to the northern shore of the Ohio river at law-water mark. Held, that the taking up of land in the bed of the Ohio river between the thread of the stream and the northern shore was unauthorized.

HAZELRIGG, CHENAULT & HAZELRIGG and ORIE S. WARE for appellant.

For appellant we contend that the owners of land on the south of the Ohio river under the calls to monuments on the south bank and running with the meanders of the river, by construction or intendment hold title only to the middle thread of the river.

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AUTHORITIES CITED.

Handley's Lessee v. Anthony, 5 Wheaton U. S. Sup.), 374 Louisville Bridge Co. v. City of Louisville, 81 Ky., 189; 5 Ky. Law Rep., 16; Berry v. Snyder, 3 Bush (Ky.), 266; Jones v. Soulard, 24 Howard (U. S. Sup.), 63; Miller v. Hepburn, 8 Bush (Ky.), 326; Williamsburg Boom Co. v. Smith, 84 Ky., 374; Kentucky Lumber Co. v. Green, 87 Ky., 257; Stonestreet v. Jacobs, 26 Ky. Law Rep., 628; Spurrier v. Hodges, 28 Ky. Law Rep., 804; Kent's Commentaries, vol 3, 8th ed., 531.

N. B. HAYS, Attorney General, and C. H. MORRIS for appellee.

1. There can be no question but that the low water mark on the north side of the Ohio river is the boundary line of the State of Kentucky.

2. A grant on a navigable stream will convey all the land owned by the grantor, in the absence of anything to show an intention not to do so. This seems especially true where the boundary is a river which is at the same time the boundary of a State.

AUTHORITIES CITED.

Louisville Bridge Co. v. City of Louisville, 81 Ky., 195; Handley's Lessee v. Anthony, 5 Wheaton, U. S., 374; Brown v. Kennedy, 5 Hair and J., 157; Jones v. Columbus G. Company, 18 Ga., 539; People v. Gold Run D. & M. Co., 6 Cal., 138; St. Louis I. M. & S. R. Co. v. Ramsey, 53 Ark., 314; Benson v. Morrow, 61 Mo., 345; Elder v. Burrus, 6 Humph., 358; Stuart v. Clark, 2 Swan., 9; Hagan v. McMurtry, 5 T. B. Monroe, 181; Bruce v. Taylor, 2 J. J. Marsh., 160; Morrison v. Taylor, 14 B. Mon., 367; Louisville v. Bank of United States, 3 B. M., 133.

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

This action was instituted by appellant Fanny Ware in the Franklin circuit court against appellee S. W. Hager, auditor of public accounts and ex-officio custodian of the land office, to compel him to file the certificate and plat of the county surveyor of Campbell

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county for a tract of vacant unappropriated land in that county entered and surveyed by appellant pursuant to an order of the Campbell county court, and to issue her a patent therefor. All the proceedings necessary for the issuing of a patent are specifically set out in the petition. But the tract of land sought to be patented consists of 200 acres beneath the waters of the Ohio river and lying between the thread of the stream and the low-water mark on the northern shore. It is alleged that the land south of the Ohio river and opposite the land sought to be patented has heretofore been duly patented by the commonwealth, and that these patents call for a corner on the south bank of the Ohio river, and thence with the river as it meanders to another point on the south bank of the river. The circuit court dismissed the petition, and the plaintiff appeals.

It is well settled that the boundary of the state of Kentucky extends to the northern shore of the Ohio river at low-water mark. Handley v. Anthony, 5 Wheat. (U. S.) 374, 5 L. Ed. 113; Louisville Bridge Company v. Louisville, 81 Ky. 189, 5 Ky. Law Rep. 16, 473. It has also been held by this court that patents issued by the state of Kentucky for land on the Ohio river give the patentees title to the thread of the stream (Berry v. Snyder, 3 Bush. 266, 96 Am. Dec. 219; Miller v. Hepburn, 8 Bush, 326), and it is insisted for appellant that the land north of the thread of the stream and between that and the low-water mark on the northern shore is vacant land. On the other hand, it is insisted for the appellee that, as the state of Kentucky owns no land on the opposite side of the river, the Kentucky patents for land on the south bank of the river should be held to extend to the State boundary line, and that therefore the

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land sought to be patented is not vacant land. The court is not inclined, after so many years, to depart from the rule laid down in the cases cited; but there is another reason for which the judgment appealed from was proper. While the State owns the land to the northern shore of the river, we do not think it has ever provided for the taking up of the river bed between the thread of the stream and the northern shore as vacant land. The proceedings in question was instituted under chapter 127, Ky. St. 1903. Section 4702, which is the first section of that chapter, provides that each county in the State shall have the right to dispose of the unappropriated lands lying therein not otherwise provided for in the manner thereinafter directed. Section 4703 provides that an actual settler on any vacant or unappropriated land shall have a pre-emption right to any number of acres, not exceeding 100. It also provides that any person who wishes to appropriate any vacant or unappropriated land may obtain an order of court authorizing him to enter and survey any number of acres, not more than 200. Section 4704 provides that the surveyor shall survey the entries in the order of time in which they are made, bounding the same by plainly marked trees, stones, or stakes, and noting where they bind on a water course or a marked line of another survey. In enacting these provisions, we cannot believe that the Legislature had in mind the taking up of the bed of the Ohio river between the thread of the stream and the northern shore. Such a survey could not be marked by stones or stakes or plainly marked trees. There could be no actual settlers on such land. While we do not doubt the power of the Legislature to provide for the issuing of patents for the bed of the Ohio river north of the

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thread of the stream, so that the sand or minerals which may be on or under this land may be appropriated, we do not think it has yet done so, and therefore the circuit court properly dismissed the petition.

Judgment affirmed.

Petition for rehearing by appellant overruled.

CASE 39.—ACTION BY MARGARET M. BEELER AGAINST THE LOUISVILLE & NASHVILLE R. R. CO.—June 26.

Louisville & Nashville R. R. Co. v. Beeler

Appeal from Bullitt Circuit Court.

SAMUEL E. JONES, Circuit Judge.

Judgment for plaintiff, defendant appeals.—Affirmed.

1. Railroads—Fires—Contributory Negligence.—The owner of land adjoining a railroad violates no duty to it by allowing his land to grow up with grass, weeds or brush.
2. Pleading—Facts or Evidence.—In an action against a railroad company for negligently burning plaintiff's orchard, defendant was not required to plead that its engines were screened, as required by Ky. Stats., 1903, Secs. 782, 790; such fact being mere evidence relevant to the question of defendant's negligence.
3. Railroads—Fires—Question for Jury.—In an action against a railroad for burning plaintiff's orchard, evidence held sufficient to require the denial of a peremptory instruction for defendant.
4. Same—Damages—Excessiveness.—Plaintiff's orchard, containing 800 or 900 trees, was injured by fire negligently set out by defendant railroad company. One of defendant's witnesses testified that the damage amounted to $2.50 a tree. Soon after the burning the railroad company had two persons assess the damage, who found it to amount to $2,461, though

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there was other proof for defendant placing the amount considerably lower. Held, that a verdict for $2,000 was not excessive.

5. Same—Measure of Damages.—In an action against a railroad company for injuries to plaintiff's orchard by fire, the measure of damages was the reasonable value of the trees destroyed and the difference in value of those injured before and after the injury, and not the difference in value of the whole farm before and after the fire.

6. Appeal—Exclusion of Evidence—Prejudice.—Where, in an action against a railroad for injury to plaintiff's orchard by fire, the difference in the evidence with reference to the damages in the end lay in the fact that some of the witnesses placed a lower value on the fruit trees than others, defendant was not prejudiced by the court's erroneous exclusion of evidence as to the value of the entire farm before and after the injury, as a circumstance bearing on the value of the trees destroyed and injured.

BENNETT H. YOUNG, CHAPEZE & HALSTEAD and E. C. WAIDE for appellees.

No brief for appellee in the record.

BENJAMIN D. WARFIELD for appellant.

FAIRLEIGH, STRAUS & FAIRLEIGH of counsel.

POINTS DISCUSSED AND AUTHORITIES CITED.

1. Appellee's petition, as amended, did not state a cause of action. She did not allege facts to bring the case within either Sec. 782 or Sec. 790, Ky. Stats. The demurrer to the petition should have been sustained, and appellant's motion for a peremptory instruction should have been granted, among other reasons, because of the error of the trial court in overruling such demurrer. L. & N. R. Co. v. Dalton, 102 Ky., 290.

2. The court erred in striking from appellant's answer, and amended answer, the second paragraphs thereof pleading appellee's contributory negligence in permitting her orchard to be foul from combustible materials. This was a question for the jury. L. & N. R. Co. v. Samuel's Exors., 22 Ky. Law Rep., 303; Kellogg v. Chicago, etc., R. Co., 26 Wis., 223; Kansas, etc., R. Co. v. Brady, 17 Kan., 380; Karsen v. Milwaukee, etc., R. Co. 29 Minn.,

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12; Gram v. Northern Pac. R. Co., 1 N. Dak., 252, 46 N. W., 972, 45 A. & E. R. Cas., 544; Rose v. Boston, etc., R. Co., 6 Allen, 87; Ohio, etc., R. Co. v. Shanefelt, 47 Ill., 497 Erie, etc., R. Co. v. Dicker, 78 Pa. Stat., 293; Brown v. Hannibal, etc., R. Co., 37 Mo., 298; Missouri, etc., R. Co. v. Kincaid, 29 Kan., 654, 11 Am. & Eng. R. Cas., 83; Kansas City, etc., R. Co. v. Owen, 25 Kan., 419; Chicago, etc., R. Co. v. Pennell, 94 Ill., 448; Briant v. Detroit, etc., R. Co., 104 Mich., 307, 62 N. W., 365; Collins v. N. Y., etc., R. Co., 5 Hun., 499; Omaha Fair Assn. v. Mo. Pac. R. Co., 42 Neb., 105, 60 N. W., 330; Murphy v. Chicago, etc., R. Co., 45 Wis., 222; Coates v. Missouri, etc., R. Co., 61 Mo., 38; Great Western R. Co. v. Haworth, 39 Ill., 346.

3. The court erred in striking out an appellee's motion parts of the third paragraphs of appellant's answer and amended answer. The averments of those paragraphs not stricken out, however, not having been controverted by reply, must be taken as true, and appellant's motion for a peremptory instruction should have been sustained because of such uncontroverted averments, if for no other reason.

4. Appellee introduced no testimony that the fires were started by sparks from appellant's engines, and, therefore, made no case to submit to the jury.

5. But even if the jury had a right to guess that the fires were started by sparks from appellant's engines, still it could only be made liable for damages caused by the fires, upon appellee's showing that appellant was negligent, either in failing to provide proper spark arresters, or in the management of its engines. There is not a scintilla of testimony to support liability against appellant on either of these grounds.

6. The court erroneously permitted appellee to prove, by the opinions of witnesses, the value of her apple and peach trees and vines claimed to have been damaged, but refused to permit appellant to prove the value of the realty before and after the fires; and also erred in submitting the case to the jury on appellant's theory as to the proper measure of damages. Appellant insists that the true "measures of damages is the difference in value of the land before and after the injury." Dwight v. E. C. & N. R. Co., 15 L. R. A., 612, and cases there cited; Pacific Express Co. v. Lasker Real Estate Assn., 16 S. W., 792; Ib. v. Smith, Ib. 998.

I. C. R. Co. v. Riney's Admx., 21 Ky. Law Rep., 1056, seems not to have been well considered, the question as to the proper measure of damages seems not to have been discussed, and that case ought not to be regarded as authority against appellant in this case.

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OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

Margaret M. Beeler owns a tract of land adjoining the right of way of the Louisville & Nashville Railroad Company in Bullitt county. She had on her tract an orchard of apple and other fruit trees. In the fall of the year 1904 her orchard was burned over, and a number of the trees were killed or seriously injured. She brought this suit against the railroad company, charging that the fire was caused by its negligence. The defendant filed an answer, in which it denied the allegations of the petition and charged in the second paragraph that the fire was due to the plaintiff's negligence, in that she had suffered her orchard to grow up in weeds, grass, and brush, and but for this it would not have been injured. In the third paragraph it pleaded that its engines were provided with spark arresters, as provided in section 782, Ky. St. 1903. The court struck out the second paragraph and part of the third paragraph of the answer.

The owner of land adjoining a railroad violates no duty to the railroad when he allows his land to grow up in grass, weeds, or brush. There is no negligence without the violation of some duty, and there can be no contributory negligence when no duty is placed on the plaintiff to exercise care. Unless the plaintiff has been guilty of a breach of duty, the question of contributory negligence cannot arise. Jaggard on Torts, 960. The rule as to contributory negligence in cases of this character is thus stated in 2 Shearman & Redfield on Negligence, section 690: "The occupant of land near to, or even next to, the track

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of a railroad, is not chargeable with contributory negligence merely by reason of leaving his land in its natural state or making any legitimate use of his property. It makes no difference if by so doing his property may be extremely liable to take fire, in the event of the railroad trains being negligently managed. He is not required to anticipate such negligence, nor to give up the lawful use of his property, in such manner as would be deemed prudent under ordinary circumstances, simply because a railroad has been constructed beside his land." See, also, 2 Thompson on Negligence, section 2315; 3 Elliot on Railroads, section 1228. This rule was recognized by us in Louisville & Nashville Railroad Company v. Samuels, 57 S. W. 235, 22 Ky. Law Rep. 303, although that case was distinguished, because there Samuels had built the house in controversy on the right of way of the railroad company.

The court seems to have intended to strike out the matter pleaded in the third paragraph as a defense. At any rate he treated it throughout the trial as matter of evidence, and this view seems to have been concurred in by counsel on both sides. The plaintiff charged that the defendant negligently burned her property. When the defendant traversed the allegations of the petition, the issue was made up. That the engines were screened as provided by the statute was matter of evidence on the question of negligence; but it is unnecessary for the defendant to plead his evidence, and, if he does plead it, it is unnecessary that the plaintiff should take issue upon it. Sections 782 and 790, Ky. St. 1903, are as follows:

"Section 782. All companies shall place in, on or around the tops of the chimneys of engines, a screen, fender, damper or other appliance, that will prevent,

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as far as possible, sparks of fire from escaping from such chimneys."

"Section 790. Every company shall keep its right of way clear and free from weeds, high grass, and decayed timber, which, from their nature and condition, are combustible material, liable to take and communicate fire from passing trains to abutting or adjacent property."

The proof for the plaintiff showed that the fire originated on the railroad's right of way, and spread from it to the plaintiff's land. The proof also showed that the defendant had mowed the grass and weeds upon its right of way some time before the fire, but had left them lying upon the ground. This dry material lying upon the ground was more dangerous than if it had not been cut. There was also proof that a train passed along about 10 minutes before the fire occurred, which did the damage sued for. The court, therefore, properly refused to instruct the jury peremptorily to find for the defendant. Cincinnati, etc., R. R. Co. v. Falconer, 97 S. W. 727, 30 Ky. Law Rep. 152; Southern Railway in Kentucky v. McGeoughy (Ky.) 102 S. W. 270, 31 Ky. Law Rep. 291. There was no evidence tending to show that the fire could have originated from anything except the trains, and the circumstances leave no doubt that it did originate from the passing trains.

The proof for the plaintiff was to the effect that 800 or 900 apple trees were destroyed or greatly injured. There was no controversy in the evidence as to the number of trees burned or as to the amount of injury done to the trees. The only conflict in the evidence was as to the value of the trees or the value in money of the injury done to them. The proof for the plaintiff put the damages much higher than that

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for the defendant. One witness for the defendant, who testified very clearly and seemed to understand the subject, put the damages at $2.50 a tree. Not long after the burning the railroad company had two neighbors who handled fruit and fruit trees to go upon the land and assess the damages. They assessed the damages at $2,461. There was other proof for the defendant putting the damages considerably lower, and some higher. The jury fixed the damages at $2,000. Under all the evidence, we cannot say that this was excessive.

It is earnestly insisted for the railroad company that the court erred in the admission of evidence and in its instructions to the jury on the measure of damages. The court allowed evidence to be given by both parties as to the value of the trees, the amount of the injury done them, and the value of the trees that were injured before and after the injury. He instructed the jury that they should find for the plaintiff the fair and reasonable value of the trees destroyed and the difference in value of those injured before and after the injury. He refused to instruct them that the measure of damages was the difference in value of the whole farm just before the injury and just after. The rule insisted on by the railroad company was approved by the New York Court of Appeals in an opinion by Chief Justice Parker in Dwight v. E. C. & N. R. R. Co., 15 L. R. A. 612, 132 N. Y. 199, 30 N. E. 398, 28 Am. St. Rep. 563. That case has been followed since in some of the text-books and is supported by some decisions in other states. But the contrary rule was followed by this court in I. C. R. R. Co. v. Riney, 54 S. W. 1011, 21 Ky. Law Rep. 1056, I. C. R. R. Co. v. Scheible, 70 S. W. 825, 24 Ky. Law Rep. 1708, and Cincinnati, etc., R. R. Co.

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v. Falconer, 97 S. W. 727, 30 Ky. Law Rep. 152. These cases are, we think, in accord with the weight of authority. N. & W. R. R. Co. v. Bohannon, 85 Va. 293, 7 S. E. 236; Gilman v. Brown, 115 Wis. 1, 91 N. W. 227; Montgomery v. Locke, 72 Cal. 75, 13 Pac. 401; Stoner v. Tex. Pac. Ry. Co., 45 La. Ann. 115, 11 South. 875; Burdick v. Railroad Co., 87 Iowa, 384, 54 N. W. 439; Fremont v. R. R. Co., 30 Neb. 70, 46 N. W. 217; White v. Chicago, etc., R. R. Co., 9 L. R. A. 824, 1 S. D. 326, 47 N. W. 146; Bailey v. Chicago, etc., R. R. Co., 19 L. R. A. 653, 3 S. D. 531, 54 N. W. 596.

The cardinal error in the New York rule seems to use to lie in this: That, while the railroad company has the right to take private property for public uses, it has no right to take or destroy private property by negligence. Ordinarily, where one person has negligently destroyed the property of another, he is required to compensate the person injured for the fair value of the property destroyed, and it does not lie in his mouth to say that "in destroying your property, which represented a large investment, I did you a service, rather than an injury." The owner of an estate is entitled to have his estate in such a condition as he wants it, and to keep upon it such things as he pleases. An aviary, a skating rink, a dancing pavillion, or the like, might in the judgment of the average person add very little to the value of an estate in land; and yet these things might represent a considerable investment of money. An orchard cannot be grown in a day. It requires patience and an outlay of money or labor to produce an orchard. Yet there are not a few persons who would think that the land without the fruit trees would be worth more than with them. Still the person who wants an or-

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chard, and has invested his money in it, cannot be deprived of his property by the act of a wrongdoer, and left without remedy for the loss sustained, simply because his land for other purposes or to other people might be worth as much without the orchard as with it. The railroad company here did not take the land. It simply destroyed the trees growing upon the land. We cannot see a sound distinction between the destruction of a house and the destruction of a fruit tree. The question in both cases is the same: What is the fair value of the thing destroyed?

Ordinarily in cases of this sort the court should allow evidence to be given as to what was the value of the entire premises before and after the injury, for this will be a circumstance to be considered by the jury with other evidence as to what was the value of the thing destroyed. It is not conclusive, but it is a circumstance which may be considered by the jury in determining the weight to be given the opinion evidence as to the value of the thing destroyed. But in the case at bar to have admitted the evidence would but little have elucidated the matter; for, in the end, the difference between the statements of the witnesses and those proposed to be admitted lay in the fact that the latter placed a lower value on the fruit trees than the others—some of them, perhaps, thinking they were of little or no intrinsic value. In view of the large amount of evidence that was admitted and the facts that were brought out on the trial, we conclude that the jury had the case fairly before them, that 12 practical men with the proof before them could intelligently pass upon the case, and that no substantial injury resulted from the refusal of the court to admit the evidence rejected in the case at bar.

Judgment affirmed.

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CASE 40.—ACTION BY H. M. MINK AGAINST THE LOUISVILLE & N. RY. CO. FOR DAMAGES IN DELAYING SHIPMENT OF FREIGHT.—June 26.

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Louisville &N . R. R. Co. v. Mink

Appeal from Rockcastle Circuit Court.

L. F. JOHNSON, Special Judge.

Judgment for plaintiff, defendant appeals.—Reversed.

1. Carriers—Delay in Transportation—Damages.—For delay of a carrier in delivering freight, there may be recovered not only such damages as normally result therefrom, but such as result from special circumstances known to the carrier at the time of the contract.
2. Same—Special Circumstances—Notice to Carrier.—Where mill machinery was shipped to be repaired, and then by a separate contract shipped back, to give the carrier notice of special circumstances from which damage would arise from delay in transportation, so as to make it liable therefor, it is not enough that the agent with whom the first contract was made knew thereof, there having been no delay in the first shipment, but the agent with whom the second contract was made must have been informed of such circumstances.
3. Same — Authority of Agents — Acquiescence — Estoppel. — Though the agent of a carrier at a certain station resigned, and his resignation was accepted, yet, no one else having been appointed for a year, and the company having in the interim left the station keys with him, and he having personally seen to billing freight, though he did not sign the bills of lading, and no notice of his discharge having been given the public, but he having been permitted to act substantially as he had done before, the carrier was estopped by its acquiescence to question his authority as agent as between it and shippers who dealt with him.

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4. Same—Damages—Evidence.—Plaintiff, in an action against a carrier for delay in transporting machinery for its sawmill, cannot by way of damages show loss from inability to fill a contract for lumber, because of the delay in transportation, in the absence of evidence that the carrier was notified of the fact of such contract.

J W. BROWN for appellant.

JNO. T. SHELBY of counsel.

QUESTIONS AND AUTHORITIES.

1. Special damages not allowed against a carrier for delay in delivering goods when not informed at the time of making the contract for the shipment of the nature of the damages that may result from the delay: Amer. Exp. Co. v. Jennings, 38 S. R., 374; Patterson v. I. C. R. Co., 97 S. W. R., 426; I. C. R. Co. v. Nelson et al., 97 S. W. R., 757.

C. C. WILLIAMS for appellee.

We submit that if the presumption is that this property reached its destination within a reasonable time (and two days appears to be a reasonable time from the evidence) then the notice of special damages that the appellee would sustain by reason of the delay would not have to be given at the time or before the shipment began.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

This was an action for damages against a common carrier by the owner of a sawmill, who shipped parts of the machinery and engine from Rockcastle county to a point in Ohio for repair and return. The carrier negligently delayed the return shipment, so that the articles were lost for about two months. The plaintiff alleged that by reason of the delay a certain quantity of logs which he had on hand deteriorated in quality, to his damage in the sum of $1,000; also,

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that he had lost two valuable customers, whose orders he could not fill because he could not operate his saw-mill without the machinery delayed in shipment, and thereby he suffered a further damage of $250. As to the measure of damages recoverable, the court instructed the jury as follows: "(2) The court instructs the jury that the criterion of damages is the difference in value of the logs plaintiff would have sawed on his mill during the time said engine cylinder and valve rod were unreasonably delayed, and the value of said logs at the time plaintiff could saw same after receiving said engine cylinder and valve rod. (3) Unless the jury believe from the evidence that the defendant railroad company, through or by some one of its duly authorized agents, or party as such agent, it was notified of the special importance of the shipment of the engine cylinder and valve rod to the plaintiff, the jury should find for the plaintiff only nominal damages.

The leading case as authority on this subject is Hadley v. Baxendale, 9 Ex. 341. The principles announced therein have been applied both in England and America with varying consistency ever since the opinion was rendered. Its interpretation has not always been the same; but the weight, and it may be said the result, of innumerable cases in which it has been followed since, settle the principle to be that in any breach of a contract the plaintiff may recover always such damages as normally result therefrom, or he may, by showing special facts to have been known to the defendant at the time of the contract, which would give notice to him that a breach of the contract would result in an otherwise unexpected loss, recover his special damages. Hadley v. Baxendale was very much like the case at bar. The plaintiffs were owners

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of a steam mill. A shaft of their machinery was broken. They gave it to the defendant, a carrier, to take to an engineer to serve as a model for a new one which he was to make. Defendant's clerk was informed, when the contract was made for shipping the shaft, that the mill was stopped, and that the shaft must be sent immediately. The carrier delayed the delivery, and, in an action for the breach of the contract, plaintiff's claimed, as special damages, the loss of profits while the mill was kept idle. In the course of the opinion this rule was laid down: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated; but, on the other hand, if the special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any

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special circumstances, from such a breach of contract, for, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract." The same principle was soon thereafter applied on this side by the Court of Appeals of New York, in Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718. The same court, in Booth v. Spuyten Duyvel R. M. Co., 60 N. Y. 487, thus stated the rule: "It is presumed that the parties contemplate the usual and natural consequences of a breach when the contract is made; and if the contract is made with reference to special circumstances, fixing or affecting the amount of damages, such special circumstances are regarded within the contemplation of the parties, and damages may be assessed accordingly."

The object of every rule on the subject is to ascertain that damage resulting from the breach which the parties, at the time the contract of affreightment was made, presumably had in mind. "Damage" means loss. Compensation would be inadequate that did not cover the loss sustained. It might be, in such a case as we have at bar, the deterioration of material on the mill owners' hands which was occasioned by the delay; but he might be entitled to more than his sound material, or its equivalent in money, for his object in having the material was to manufacture it into planks for sale. If he had a market for the lumber when so made, or contracts of sale already entered into, his profits, which were lost by reason of the delay in delivering the parts of the machinery,

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are recoverable upon the same grounds as is the depreciated value of his logs. Both items of damage grow out of the same breach, and together constitute the loss sustained by reason of it. Each of these elements is special damage. Each is a consequence of the breach, though it may not be said to be a normal consequence, because it is not the necessary consequence. It is a natural consequence of the breach only in the light of the circumstances communicated to the defendant at the time the contract was entered into. Having in mind that the parts of machinery are detached from a sawmill, which was being operated, but was shut down while the detached parts were sent away for repair, it naturally follows that an unreasonable delay in the shipment of the article by the carrier would necessitate the mills standing idle the while, and that saw logs on hand which were subject to deterioration would depreciate in quality if the delay should be protracted. It would also naturally follow that if the mill owner had contracted to deliver lumber to builders, or wholesalers, for present delivery, an unreasonable delay would result in damages to the mill owner, because he would either lose his contracts, or their profits, or be compelled by his vendees to pay damages for the failure to deliver the lumber when it was due; but unless the carrier had notice of the conditions at the mill when it undertook to carry the article, it would not be in mind, or be a probability in the mind of the parties, that a failure to deliver the article promptly would entail either a loss of the logs, or the loss of sales of lumber to be cut from the logs.

Advancing to the next step, the notice mentioned: When and to whom should it be given, and what should it contain? As may be gathered from what

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has already been said, and particularly from the authorities cited, the recovery of special damages is allowed because it was within the contemplation of the parties to the contract, and is deemed to have been in such contemplation, because having had notice of the peculiar conditions existing when it was made, the natural presumption would be that the particular loss actually sustained was to be reasonably apprehended from the defendant's breach of the contract. Hence special damages are recoverable upon the theory that they arise out of the contract. That being so, the contract must contain the essential elements to entitle the plaintiff to recover for them. One essential is the notice of the special conditions. This is bound to be so, because otherwise it would not be at all likely, and not always possible, that the parties should have had in mind the special result, as a natural or probable result of the breach. The notice is not to vary the terms of the contract, but is receivable as evidence of the surroundings of the parties, that the court may view their contract, in interpreting its terms, in the same light that the parties probably did when they entered into it. Hydraulic Eng. Co. v. McHaffie, 4 Q. B. Div. 670. Of course, if the contract provides expressly for the recovery of particular damages, which is not a limitation upon the common-law liability of the carrier against its own negligence, that would be enough in itself; but we are speaking of the implied obligation of the carrier, which enters into every contract of affreightment, that it will pay the party aggrieved—shipper or consignee—the damages which are the natural and proximate result of its breach of the contract if it breaks it, and as to what are the natural damages within the contemplation of the law, as we have seen, will depend on

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the notice of the conditions existing when the contract may be entered into. It should contain such matter as would reasonably and naturally inform the carrier of the conditions and of the probable effect of its failure to comply promptly with its part of the agreement, so that it could take such measures as would enable it to comply. The notice should be given, or be in the mind of the carrier and shipper, at the time when the contract is entered into, if it is to form a part of their contract. It should be given to the carrier. As in this country the great bulk of commerce being handled by common carriers is carried by railroad corporations, whose work is in the hands of a great number of people, the notice to such carrier should be to that agent or servant whose office and duty it is to make the contract upon which the claim for loss is based. The business of railroads is so enormous, in its very nature requiring prompitude and system in handling it, that it necessitates the dividing up the work, and putting a part into one or more agents' hands for attention. It is physically impossible for one man to know or to direct the transactions of a modern railroad carrier. Hence notice to one servant as to a matter foreign to his duties is not deemed, as it is not in truth, notice to the corporation of the fact contained in it. So a notice to an agent at station A. that freight which was to be shipped from station B., where there was another agent in charge, was of a peculiar kind, or that the conditions requiring its prompt handling were so exceptional as to entail special damages, if it was not so handled, would not be notice of such condition to the carrier. We deduce from the reasoning in the authorities, and as the simple right of matter, that the notice should be given, or be in the

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minds of both parties, when the contract of shipment is made, should be of such special matters as naturally and reasonably apprise the party to be charged of the probable special consequences of its breach, and should be given to the carrier (if a natural person), or to that agent who entered into the particular contract, or under whose authority it was made. We do not mean to be understood as saying that, for a tort of the carrier in failing to deliver freight, it may not be liable because of notice to an agent other than the one with whom the contract of shipment was made.

Applying these principles to the facts of our case here, we find that there is no evidence of notice having been given to appellant's agent at Cincinnati, Ohio, where the cylinder and rod were delivered to it for return to appellee. There is no complaint that the outward shipment by appellant was not promptly executed; but the charge is that the articles were delivered to appellant in Cincinnati, Ohio, by a connecting carrier, on May 16, 1904, to be carried by appellant to Mullins Station, in Rockcastle county, Ky., and that it failed for 66 days thereafter to deliver the said machinery, whereas, two days was a reasonable time within which to have delivered it . Now, it is not shown by any evidence that appellant's agent at Cincinnati knew, or was informed when he accepted the freight for shipment from that point to appellee at Mullins Station, that there existed any special condition that would involve special damages to appellee if the contract of shipment was breached by appellant. The evidence on the subject of notice was this: One Dooley was acting as appellant's agent at Mullins Station. He was informed at or about the time of the shipment of the machinery from Mullins

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Station to Ohio, for repair, that appellee was operating a sawmill in the neighborhood. He had nothing to do with the return shipment. The two shipments were entirely independent transactions, so far as this record discloses. Each shipment was a separate and complete affair, and the first was a closed incident before the second was inaugurated. The contract for it was as distinctly separate from the first as if the first had never been made. We therefore conclude that the third instruction, in fixing a liability for special damages upon appellant, if any of its agents knew of the special conditions existing at the time of the shipment, is erroneous. It is also erroneous in not limiting such knowledge or notice to an existence at or prior to the making of the contract which is in suit. Illinois Central Railroad Co. v. Nelson, 97 S. W. 757, 30 Ky. Law Rep. 114.

As the case must be returned for a new trial, it is proper that other matters complained of by appellant, and appearing to the court to be material, should be noticed. Dooley had been appellant's agent at Mullins Station before the outward shipment of the machinery; but he had resigned, and his resignation had been accepted. No one else was appointed for over a year. In the interim, the company left the keys of the station with Dooley, who personally saw to billing freight, although he did not sign the bills of lading. No notice of Dooley's discharge was given to the public. He was permitted to act substantially as he had done before his resignation. These acts constituted him an agent, in our opinion, so far as the public was concerned. The question of his actual authority is not so material; but his apparent authority, exercised under circumstances where appellant had knowledge of it, is enough. Appellant's acquies-

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cense, and suffering it without disavowing it, indeed, accepting and ratifying it, estop appellant from questioning the real authority of Dooley as agent, as between it and shippers who dealt with him for the company.

There was some incompetent and irrelevant evidence admitted. There was no evidence that appellant was ever notified of the fact that appellee had contracted to sell some of the lumber to be cut at his mill to the Covington parties. In the absence of such notice (given as indicated in this opinion), evidence of the prices at which the lumber was sold, or of the loss sustained by appellee because the contract of sale was not fulfilled, ought not to have been received. Horne v. Midland Railway Co., L. R. 7 C. P. 583, 8 C. P. 131; Borries v. Hutchinson, 18 C. B. (N. S.) 445, 463; Messmore v. N. Y. Shot & Lead Co., 40 N. Y. 422. Nor was it relevant that appellee was forced to sell his mill at a less price than its actual value, because he could not get back his missing machinery. If the evidence should be on another trial as it was on the last, then the jury should be instructed to award nominal damages only.

Judgment reversed, and cause remanded for a new trial under proceedings consistent herewith.

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CASE 41.—INDICTMENT AGAINST W. W. EUBANK FOR USURPATION OF OFFICE.—June 26.

126 348
f126 363
s127 263

Eubank v. Commonwealth

Appeal from Montgomery Circuit Court.

A. W. YOUNG, Circuit Judge.

Defendant convicted and appeals.—Reversed.

Officers—Offenses—Usurpation of Office—Defendant was not guilty of usurpation of office within Ky. Stats., 1903, Sec. 1364, making it an offense for any person to hold any office after his election thereto shall have been declared illegal by a court of competent jurisdiction, or to usurp any office established by law, where, though his election to the office of road supervisor was not legal, he was put into it by the fiscal court, and, though he retained possession and exercised the duties of the office after the fiscal court had declared the office vacant, there had never been a judicial determination that the election was illegal by a court of competent jurisdiction.

O'Rear, C. J., and Lassing, J., dissenting.

C. C. TURNER for appellant.

J. H. HAZELRIGG, JNO. E. COOPER, R. H. WINN of counsel.

AUTHORITIES CITED.

Civil Code, Sec. 334; Crim. Code, Sec. 348; Commonwealth v. McCready, 2 Metcalf, 377; Commonwealth v. Tarvin, Judge, 72 S. W., 13; Biggs v. McElvain's exrx., 3 A. K. Marshall, 360; Freeman v. Branham, 17 B. Monroe, 608; Allard v. Smith, 2 Metcalf, 298; Corley's exrx. v. Evans and wife, 4 Bush, 410; L. & N. Railroad v. Barbour, 9 Ky. Law Rep., 934; Commonwealth v. Lewis' admr., 19 Ky. Law Rep., 170; Adkins v. Commonwealth, 19 Ky. Law Rep., 1300; Craft v. Allen, 21 Ky. Law Rep., 244;

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Beattyville & C. R. R. Co. v. Plummer, etc., 21 Ky. Law Rep., 685; L. & N. R. R. Co. v. Turner, 5 Ky. Law Rep., 544; Tweedy v. Commonwealth, 2 Metcalf, 380; Ky. L. & I. Co. v. Reynolds, 22 Ky. Law Rep., 23; Meadows v. Campbell, 1 Bush, 104; Smith, etc. v. Blakeman, 8 Bush, 476; Gates v. Davis, 86 S. W., 1132; Commonwealth v. Adams, 16 B. Monroe, 338; Commonwealth v. Meludin, 4 Ky. Law Rep., 261; Prater v. Commonwealth, 4 Ky. Law Rep., 37; Wallace v. Commonwealth, 8 Ky. Law Rep., 436; Stratton v. Commonwealth, 8 Ky. Law Rep., 79; Skinner v. Commonwealth, 9 Ky. Law Rep., 682; Commonwealth v. Cole, 9 Ky. Law Rep., 685; Commonwealth Dist. Co. v. Commonwealth, 10 Ky. Law Rep., 816; Vandiver v. Griffith, 2 Metcalf, 425; Lynch v. Reynolds, 6 Bush, 549; Early v. Sutton, 24 Ky. Law Rep., 2381; Newport N. M. V. Co. v. Stavig, 17 Ky. Law Rep., 1113; Knecht v. Louisville Home Telephone Co., 28 Ky. Law Rep., 456.

N. B. HAYS, C. H. MORRIS, LEWIS APPERSON and C. F. THOMAS for appellee.

AUTHORITIES CITED.

Ky. Stats., Secs. 4313, 4344, 1838, 1364; Palmer v. Commonwealth, 29 Ky. Law Rep., 219; Fleming Co. Fiscal Court v. Howe, 28 Ky. Law Rep., 458; Pulaski Co. v. Sears, 25 Ky. Law Rep., 1381; Boyd Co. v. Arthur, 26 Ky. Law Rep., 908; Daviess Co. v. Goodwin, 25 Ky. Law Rep., 1081.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

Appellant was indicted by the grand jury of Montgomery county for usurpation of office. The office he was alleged to have usurped was that of supervisor of roads in and for Montgomery county; it being, in substance, charged in the indictment that though he had never been elected or appointed to the office in question, and knew he was not entitled thereto, appellant unlawfully and wilfully took possession of and held it from April 5, 1905, to January 1, 1906, during which time he pretended to cause work to be done on the public roads of the county, and wilfully and unlaw-

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fully certified to the fiscal court of the county for payment claims for work alleged to have been done thereon by others, and also claimed and had allowed by the fiscal court compensation to the amount of $600 for his own alleged services as supervisor of roads for the same time, and, in addition, that he attempted to displace from the office of supervisor of roads for the county G. P. Douglass, the duly elected and lawful incumbent thereof. Appellants trial under the indictment resulted in his conviction, the jury by their verdict finding him guilty as charged and fixing his punishment at a fine of $500. He was refused a new trial, and by this appeal seeks a reversal of the judgment of conviction.

His first contention is that the lower court should have sustained his demurrer to the indictment. This contention is without merit. The indictment is sufficiently clear and comprehensive in its "statement of the acts constituting the offense to enable a person of common understanding to know what is intended, and with such degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case." Crim. Code Prac. subsection 2, section 122.

Appellant's second contention is that the court at the conclusion of the Commonwealth's evidence should have peremptorily instructed the jury to find him not guilty. This contention necessitates a careful review of the evidence relied on by the commonwealth to establish appellant's guilt. Appellant and one Stokely were elected supervisors of roads for Montgomery county by the fiscal court of the county April 5, 1904, for a term of two years each. Each of them at once qualified by executing bond and taking the oath of office. At the same term of the court an

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order was entered dividing the county into two districts. Appellant was given control of the public roads and turnpikes of one of the districts, and Stokely of those of the other. At the April term, 1905, of the fiscal court Stokely resigned as supervisor. Whether his resignation was due to the discovery by the fiscal court that the election of more than one county supervisor of roads by the fiscal court was unauthorized by the statute, or some other cause, does not appear; but there was an effort made at the time of his resignation by some members of the fiscal court to elect a supervisor of roads. It is not clear from the order then entered whether it was proposed to elect another supervisor to take Stokely's place, or that of both appellant and Stokely. At any rate no election was held immediately following Stokely's resignation, probably because the county judge at the time advised the other members of the court that the election of another supervisor of roads would be improper, as appellant was still supervisor and had yet a year of the term for which he was supposed to have been elected to serve. On August 4, 1905, by a resolution adopted by a majority of the fiscal court and entered of record as an order, it was declared that a vacancy existed in the office of supervisor of roads for Montgomery county, and had so existed since April 5, 1905, but no election was then held by the fiscal court to fill such alleged vacancy. However, on Oct. 3. 1905, an election of a supervisor of roads to fill the alleged vacancy was held by that court which resulted in the election of G. P. Douglass by a vote of a majority of its members. The latter on October 17, 1905, gave bond and duly qualified as such supervisor. Notwithstanding the action of the fiscal court of August 4, 1905, by which the office of

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supervisor of roads for the county was declared vacant, and its action of October 3d in electing Douglass to that office, appellant still claiming to be the lawful incumbent of the office, assumed and continued to act as supervisor until January 1, 1906, and from April 5, 1905, to January, 1906, he caused work to be done on certain roads and pikes of the county, and performed other services appertaining to the office of supervisor of roads, as if his right to so act had never been questioned. On April 5, 1906, he presented to the fiscal court an account of $600, salary for services alleged to have been rendered by him as supervisor of roads between April 5, 1905, and January 1, 1906. His claim and those of others for work done on the county roads by his employment were allowed by the fiscal court, though the allowance of his claim was resisted by the county attorney, who later prosecuted an appeal to the circuit court of the county in the effort to defeat it, which appeal appears to be yet undecided.

Do the undisputed facts referred to show appellant guilty of the usurpation charged? The indictment against appellant was found under section 1364, Ky. St., 1903, which provides: "If any person shall usurp any office established by the Constitution or laws of this Commonwealth, or shall knowingly hold and pretend to exercise such office, after his election or appointment thereto shall have been declared by a court of competent jurisdiction illegal or void, or after his term of office has constitutionally or legally expired, he shall be guilty of a misdemeanor and fined in a sum not less than $500.00, nor more than $1,500.00." In construing the section, supra, this court, in Palmer v. Commonwealth, 122 Ky. 693, 92 S. W. 588, 29 Ky. Law Rep. 219, said: "An analysis

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of section 1364 shows that it provides for three distinct offenses: First, the usurpation of an office; secondly, knowingly holding and pretending to exercise an office after the election or appointment of the incumbent has been declared illegal by a court of competent jurisdiction; and, third, holding over after the term of the incumbent has constitutionally or legally expired. * * * Webster defines the word 'usurp' as follows: 'To commit seizure of place, power, function, or the like, without right; to seize and hold it in possession by force or without right; as to usurp a throne, etc.' Bouvier in his Law Dictionary defines 'usurper' to be one who intrudes himself into an office which is vacant and ousts the incumbent without any color of title whatever. His acts are void in every respect. * * * To usurp an office, then, is to sieze it by force, actual or constructive, without any color of right or title. * * * Wayman v. Commonwealth, 14 Bush, 466." Obviously appellant is not an usurper. While his election to the office of supervisor of roads was not legal or valid (Fleming County Fiscal Court v. Howe, County Judge, etc., 121 Ky. 478, 89 S. W. 225, 28 Ky. Law Rep. 458), he did not seize or hold it by force, nor did he "intrude himself into it when vacant, or oust the incumbent without any color of title whatever." On the contrary, he was put into it by the act of the fiscal court under the mistaken belief on the part of the members of the court, and on his part as well, that his election to the office was legal. Therefore, in taking possession of the office he was not an intentional wrongdoer. Even when the fiscal court considered the question of electing a supervisor of roads immediately following the resignation of Stokely, it was not then claimed by any of its members that his election was void. On the contrary, the election of

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a supervisor at that time was prevented by the advice of the county judge that appellant was still supervisor, and the election of another would not be legal. By this advice it was meant that appellant's election was then believed to be legal.

It is equally obvious that appellant does not fall within the third offense named in the statute, for it is not claimed that he was guilty of holding on to the office in question after the expiration of a term to which he had been legally or otherwise elected. If guilty of any offense at all within the meaning of the statute, it was the second defined therein, viz., that of knowingly holding and pretending to exercise the duties of an office after his election or appointment thereto had been declared illegal or void by a court of competent jurisdiction. In our opinion he was not guilty of the offense last named. While it is true he retained possession and exercised the duties of the office of supervisor of roads after the fiscal court declared the office vacant, and after the election of Douglass, there was never a judicial determination by a court of competent jurisdiction that his election to the office in question was illegal or void. The fiscal court was a tribunal possessing the jurisdiction to decide that question, but it did not do so. Its judgment on the subject went no further than to declare a vacancy, but this was without legal notice to appellant, as was the election of his successor. Consequently he had no day in court, or opportunity to show his right, if any he had, to continue in the office. It cannot, therefore, be claimed that the declaration of vacancy made by the fiscal court operated to oust appellant from the office. As de facto supervisor of roads he was entitled to notice of the action contemplated by the court. Such notice was necessary to give

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it jurisdiction of his person, and, in the absence of such notice, the proceeding was not by due process of law, as far as he was concerned, for which reason he was not concluded thereby. The question is not affected by the fact that his election was void under the statute; for, according to the language and meaning of the statute, it was necessary for it to be declared void by a court of competent jurisdiction, after legal notice to appellant, to make him guilty of the second offense created by the statute.

The decision of this court in Fleming County Fiscal Court v. Howe, etc., 121 Ky. 478, 89 S. W. 225, 28 Ky. Law Rep. 458, to the effect that only one supervisor of roads can be elected for a county, was not rendered until November 17, 1905, more than a month after the election of Douglass to the office of supervisor of roads for Montgomery county, and but little more than a month before appellant surrendered the office. Appellant during the entire time of his exercise of the duties of the office of supervisor of roads was at least a defacto officer. In Mechem on Public Officers, section 321, it is said: "Contradistinguished from the officer de facto is the mere usurper or intruder, who is one who has intruded upon the office and assumes to exercise its functions without either the lawful title or the color of right to it. His acts, therefore, are entirely void. He may, however, as is stated in the last section, grow into an officer de facto, if his assumption of the office is acquiesced in." It is further said by the same author in section 322: "It is evident that two different persons cannot at the same time be in the actual occupation and exercise of an office for which one incumbent only is provided by law. There cannot, therefore, be an officer de jure and another officer de facto in possession of the same

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office at the same time. Hence, if the officer de jure is in, there is no room for an officer de facto; and, if the officer de facto is in, the officer de jure cannot be in also." Notwithstanding its declaration of a vacancy in the office, and the election of Douglass, the fiscal court, as abundantly shown by the testimony of the Commonwealth, thereafter recognized appellant as a de facto officer. As late as September, 1905, it received his report of work on the roads of the county as supervisor, and on April 5, 1906, allowed his claim for salary as such officer for the last year of his incumbency of the office. However,, we do not mean to say whether his claim should or should not have been allowed; that being a question to be decided on the appeal by the circuit court.

In view of the admitted facts shown by the record, appellant's conviction was unauthorized, and the court should have peremptorily instructed the jury to acquit him.

Wherefore the judgment is reversed for a new trial, and for further proceedings consistent with the opinion.

CHIEF JUSTICE O'REAR and JUDGE LASSING dissent.

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CASE 42.—INDICTMENT AGAINST J. W. HENRY AND OTHERS FOR MALFEASANCE IN OFFICE.—June 26.

Henry, etc., v. Commonwealth

126 357
137 194

Appeal from Montgomery Circuit Court.

A. W. YOUNG, Circuit Judge.

Defendants convicted, and appeal.—Reversed.

1. Officers—De Facto Officers—Acting Under Invalid Election.—A person assuming the duties of supervisor of roads by virtue of a void election by the fiscal court, and discharging the duties of the office with the acquiescence of the court, even after the office had been declared vacant and another supervisor elected, is an officer de facto.
2. Counties—County Board—Criminal Responsibility of Members.—The members of a county fiscal court in allowing the claim of a de facto supervisor of roads against the county acted in a judicial or quasi judicial capacity, and were not criminally liable for an error of judgment, departure from sound policy or an act contrary to law, where they acted honestly and with good motives.

C. C. TURNER, HAZELRIGG, CHENAULT & HAZELRIGG, JNO. E. COOPER and R. H. WINN for appellants.

N. B. HAYS, Attorney General, C. H. MORRIS and C. F. THOMAS for Commonwealth.

See citations of authorities for both appellant and appellee in case of Eubank v. Commonwealth in this volume.—Reporter.

OPINION OF THE COURT BY JUDGE SETTLE.—Reversing.

The appellants, J. W. Henry, T. N. Perry, and C. L. Dean, together with J. H. Schultz, all justices of the

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peace in and for Montgomery county and members of its fiscal court, were indicted by the grand jury of that county for malfeasance in office. Later the appellants were tried in the circuit court for the offense in question, and each found guilty by verdict of the jury; the punishment of the appellants Henry and Dean being fixed at a fine of $350 each, and that of appellant Perry at $100. The court entered judgment against appellants in favor of the Commonwealth for these fines, and, in addition, declared their right to the offices held by them, respectively, forfeited, and the offices vacant. Appellants thereupon applied for and were refused a new trial, following which they superseded the judgment and prosecuted this appeal.

The charge of malfeasance made in the indictment was based upon the act of each of the appellants in voting in their official capacity as members of the fiscal court to allow and pay out of the funds of Montgomery county a claim of $600 in favor of one W. W. Eubank, demanded by the latter as a year's salary for services alleged to have been performed by him as supervisor of the roads and turnpikes of Montgomery county; it being alleged in the indictment that Eubank was not and had never been supervisor of the roads and turnpikes of the county, that he was not entitled to the salary claimed or any part thereof, and that these facts were known to appellants when they voted to allow and pay the salary. It was therefore charged in the indictment, argued on the trial in the court below, and is now contended that in voting to appropriate the money of Montgomery county to the payment of Eubank's claim appellants acted willfully, unlawfully, and corruptly, and, if so, they were guilty of malfeasance as charged. It appears from the record that Eubank and one Stokely were together

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elected supervisors of the roads and turnpikes of Montgomery county by the fiscal court in April, 1904, for two years each, and that each of them immediately qualified by giving bond and taking the oath of office. At the same term of the court an order was entered dividing the county into two road districts. Eubank was given charge of the roads and turnpikes in one of these districts, and Stokely of the roads and turnpikes in the other. At the April term, 1905, of the fiscal court, Stokely resigned as supervisor of roads, and there was at the same time some talk among the members of the fiscal court about electing a supervisor of roads. Indeed, a resolution to that effect was offered, but not adopted, because the members of the court were advised by the county judge that the county could have but one supervisor of roads, and that, as Eubanks was still acting in that capacity and would continue to do so for another year, the election of another would be unauthorized. Thereupon the matter of electing a road supervisor was for the time being dropped. But at a regular term of the fiscal court held August 4, 1905, a resolution adopted by a majority vote of its members was entered of record declaring the office of road supervisor vacant. At a subsequent term of the fiscal court, which convened October 3, 1905, an election was held to fill the vacancy, and, a majority of the members of the court having voted for G. P. Douglass, he was declared duly elected supervisor of roads for Montgomery county for a term of two years. Douglass about two weeks later executed bond and duly qualified as such supervisor.

The action of the fiscal court on August 4, 1905, declaring a vacancy in the office of supervisor of roads, was doubtless superinduced by the opinion of

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this court in the case of Boyd Co. v. Arthur, 118 Ky. 932, 82 S. W. 613, 26 Ky. L. R. 908, decided November 4, 1904, in which it was held that a county judge could not be empowered by the fiscal court of a county to perform the duties of road supervisor. In reaching that conclusion this court in part said: "The statutes that we have referred to have the same end in view when they forbid the members of the fiscal court being interested in any contract or work, and in providing that they may appoint one supervisor for the whole county and exercise supervision over him." In the case of Fleming County Fiscal Court v. Howe, County Judge, etc., 121 Ky. 478, 89 S. W. 225, 28 Ky. Law Rep. 458, decided November 18, 1905, and therefore after the Montgomery county fiscal court declared that a vacancy existed in the office of road supervisor for that county, and also after the election of Douglass, the question of whether the fiscal court can elect more than one supervisor of roads for the county was for the first time presented to this court for decision. The Fleming county fiscal court had elected six supervisors of roads for that county. In that case this court, after quoting and construing the statutes as to the duties of the fiscal court in respect to the roads and turnpikes of the county, said: "Ky. St., 1903, section 4313, empowers the fiscal court of any county wherein the roads are worked by taxation, to appoint a 'supervisor of roads in and for the county.' Section 4314 requires the supervisor to take an oath, and give bond for the faithful performance of his duties. Section 4315 prescribes his duties with great particularity. Section 4344 permits the fiscal court to authorize the supervisor to appoint assistant supervisors to aid him in the discharge of his duties, and section 4346 directs the fiscal court to fix and appropriate

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money to pay a reasonable compensation to the supervisor annually and also to pay any assistant supervisor for his services. The statute in respect to turnpike and gravel roads (Act March 17, 1896; Acts 1896, p. 39, c. 27; Ky. St., 1903, section 4748a, subsecs. 1-16, inclusive) does not provide for the appointment of a supervisor, or mention such an officer, but it does declare that turnpike or gravel roads acquired or constructed by a county shall become public roads and be maintained and kept in repair by and through the fiscal court of the county, and that the fiscal court may provide for keeping them up as is directed and permitted under the 'general road law,' or it may adopt rules for otherwise maintaining them. The fiscal court seems to have attempted to follow both these plans in maintaining its turnpikes, for it adopted certain rules applicable to the turnpikes alone as provided by the statute in regard to turnpikes and gravel roads, but in appointing supervisors to take charge of and keep the turnpikes in order, it endeavored to follow the general road law without conforming to its requirements, for the statute as to public roads, known as the general road law, as before remarked, allows the appointment of but one supervisor of roads by the fiscal court, though, by order of that court, he (the supervisor) may appoint assistant supervisors. We know of no reason why the fiscal court may not maintain the turnpikes of the county under rules adopted for that purpose as provided by the statute as to turnpikes, and at the same time avail itself of the right conferred by the statute regarding other public roads to appoint a supervisor to take control of them. But, if it does so, it can appoint but one supervisor. The fiscal court is a court of limited jurisdiction. Its powers are defined by statute, and

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must be exercised accordingly. It cannot create offices or appoint officers without statutory authority."

In view of the conclusion expressed by this court in the case supra, it is patent that the election of Eubank by the fiscal court was void. But, conceding this to be true, was he not supervisor de facto until the office was declared vacant by the fiscal court August 4, 1905, and even after that time as long as his discharge of the duties of the office was acquiesced in by the fiscal court. "An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where duties of the office were exercised, first, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action supposing him to be the officer he assumed to be; second, under color of a known or valid appointment or election, but where the officer has failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power of defect being unknown to the public; fourth, under color of an election, or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." Mechem on Public Officers, section 318. That Eubanks was not an usurper in attempting to perform the duties of the office in question after the alleged vacancy therein was

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declared by the fiscal court was this day decided by this court in the case of Eubank v. Commonwealth, 126 Ky. ——, 103 S. W. 368, 31 Ky. Law Rep. 746. He certainly took possesison of the office in the beginning under and by virtue of the election at the hands of the fiscal court, which, though void, because that body was without power to elect him in conjunction with another to the one office, at least relieves him of the onus of having seized or intruded upon the office and assumed to exercise its functions without color of right. Not only did he undertake in good faith the performance of its duties, but, in electing both him and Stokely to the same office, permitting them to assume its functions and Eubank to continue in the office after its declaration of a vacancy therein and the election of Douglass thereto, the fiscal court, though laboring under a mistake as to the meaning of the staute creating the office, evidently acted in good faith. The appellant Dean was elected and appellants Henry and Perry re-elected—each from his own magisterial district—justices of the peace at the regular November election, 1905, for terms beginning the first Monday in January, 1906, and each of them duly qualified by giving bond and taking the oath of office December 18, 1905.

As before stated, the claim of $600 presented by Eubank to the fiscal court at its April term, 1906, was for salary alleged to be due him as road supervisor for the year ending January 1, 1906. Appellants and their associate, Schultz, who for some reason unexplained in the record was not tried, voted to allow his claim, and, as the four constituted a majority of the court, it was allowed. It now remains to be determined whether there was any evidence introduced upon the trial which conduced to prove that appellants or any of them in thus voting were actuated by

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a corrupt motive. It is insisted for the commonwealth that such proof is furnished by the facts that appellants, before voting to allow Eubank's claim, were advised that his election was void, for the fiscal court had so declared in August, 1905, and confirmed that declaration by electing a road supervisor in October following; and also because the county attorney, while the claim was being considered by the fiscal court, cited and read from the cases of Boyd County v. Authur, and Fleming County Fiscal Court v. Howe, supra, to show that the election of Eubank was void, and from that premise argued that his claim for salary was invalid, and should therefore be rejected. The testimony referred to was, it is true, made by the Commonwealth, but the inferences deducible therefrom do not necessarily prove a corrupt motive on the part of any of the appellants in voting to allow Eubank's claim. Certainly such inferences do not as strongly tend to show a corrupt motive on the part of appellants Henry and Perry in thus voting, as does their conduct, with respect to Eubank's incumbency of the office of road supervisor, prove their belief in the validity of his election, however mistaken that belief; for, according to the evidence appearing in the record, the appellants, especially Henry and Perry, continued to believe him the lawful incumbent of the office as long as he claimed the right to remain in possession of it. As members of the fiscal court, they, Henry and Perry, voted against the order of that court of August 4, 1905, declaring the office vacant, and also against filling the vacancy by the election of his successor, Douglass, on October 3, 1905. It is apparent from the record that the claim of Eubank was allowed after considerable discussion, in which the county attorney, county judge, and nearly

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all the magistrates composing the fiscal court took part; that the county attorney excepted to its allowance and took an appeal to the circuit court. However erroneous may have been the act af appellants in voting to allow it, they, as testified by the county judge, made the statement before the fiscal court, when the claim was being considered, that Eubank had done the work as supervisor, and he was entitled to his pay for it. Schultz, who, though jointly indicted with appellants, was introduced as a witness by the Commonwealth, testified that the appellant Perry out of court told him, in talking of the Eubank claim, "that it was right and ought to be allowed." Whatever may have been the legal effect of the order of August 4, 1905, it seems to be conceded that Eubank performed the duties of road supervisor from the beginning of the year, 1905, down to the time of the election of Douglass, and it also appears from the evidence that he, in some measure at least, continued to discharge its duties until the end of the year. It is but fair to presume that appellants as members of the fiscal court had opportunities to know what service he performed, and whether or not it extended over the period covered by his account presented to the fiscal court for allowance.

The county judge, who was presumably better informed of the law than were the magistrates composing the fiscal court, though of the opinion when Eubank's claim was allowed that he had never been legally elected road supervisor, nevertheless expressed a different opinion at the April term, 1905, when Stokely resigned, by then saying the election of another supervisor, as at that time proposed, would not be proper, for Eubank yet had a year to serve as the incumbent of the office. Is the fact that he

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afterward changed his opinion and came to the conclusion that Eubank's election was void, to be taken as evidence that the county judge acted in bad faith in expressing either opinion? Surely not. Sinister or corrupt motives are not to be imputed to those charged with the performance of official duties, in the absence of evidence sufficiently strong to justify such inference. Especially is this true as to the acts of judicial officers. The law on this subject is well expressed in Roberson's Kentucky Criminal Law, section 814, as follows: "A judicial officer cannot be punished for judicial acts performed by him, however erroneous, on subjects within the scope of his authority and over which he has jurisdiction. But this rule does not hold good where he acts from some motive of malice, partiality, or corruption, or when he attempts to exercise authority where he has none, and assumes jurisdiction without any power. * * * A person serving in an official capacity in which he is called upon to exercise his own judgment or discretion is not criminally liable for his acts, unless he acts willfully, maliciously, or corruptly." 19 Am. & Eng. Ency. of Law (1st Ed.) 503; 2 Bishop, Crim. Law (7th Ed.) 980. In 1 Bishop, Criminal Law, section 460, it is said: "One serving in a judicial or other capacity, in which he is required to exercise a judgment of his own, is not punishable for a mere error therein, or for a mistake of law. His act to be cognizable criminally, or even civilly, must be willful and corrupt." In Throop on Public Officers, section 859, we find the law on the same subject thus stated: "The second class of exceptions relates to the nature and character of the particular functions with respect to which the offense of nonfeasance, misfeasance, or malfeasance was committed. It is well settled that a judicial

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officer, from the highest to the lowest grade, is not punishable criminally for an honest error or mistake made by him in performing a judicial act of which he has jurisdiction. So also an officer exercising a quasi judicial power is not punishable for any honest mistake of judgment in the exercise of that power, but only for an abuse of his power in proceeding from a corrupt or other improper motive." Mechem on Public Officers, section 636. Neither a judicial or legislative officer is liable even in a civil action for damages for an erroneous act where in the exercise of a power he is vested with a discretion. Gregory v. Brown, 4 Bibb. 28, 7 Am. Dec. 731; Hollon v. Lilly, 100 Ky. 553, 18 Ky. Law Rep. 968, 38 S. W. 878. The magistrates of a county are by law ex officio members of the fiscal court. They are required to meet in a body to levy taxes and appropriate funds for the needs of the county. Such duties are quasi judicial and at the same time quasi legislative in character, and for error or mistake in their performance neither the magistrates nor the sureties in their official bonds are responsible in an action for damages. Commonwealth, for Use, etc., v. Kenneday, 118 Ky. 618, 82 S. W. 237, 26 Ky. Law Rep. 504; Mechem on Public Officers, sections 644-646; Cooley on Torts, 276; Pennington v. Woolfolk, 79 Ky. 16, 3 Ky. Law Rep. 42; McLean County v. Deposit Bank, 81 Ky. 254, 5 Ky. Law Rep. 97; Muhlenburg County, etc., v. Morehead, 46 S. W. 484, 20 Ky. Law Rep. 376; Fleming v. Dyer, etc., 47 S. W. 444, 20 Ky. Law Rep. 689. In Throop on Public Officers, section 540, we are told: "The act of a board of supervisors is judicial when it allows or rejects an account against the county." In section 552 of the same work it is said: "So it has been ruled in several cases that county commissioners, super-

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visors, and other similar bodies, in deciding upon claims against the county, parish, or other municipality, act judicially." And again, in section 553, we are further told by the author: "Where in the exercise of a power an officer is vested with a discretion, his act is regarded as quasi judicial."

It is apparent from the foregoing authorities, and many others that might be cited, that appellants as members of the fiscal court acted in a judicial or quasi judicial capacity in voting to allow Eubank's claim. They, therefore, acted in the exercise of a legal discretion, and, this being true, although it be conceded that in voting to allow the claim in question they were guilty of an error in judgment, departure from sound policy, or that they acted contrary to law, it is not sufficient to subject them to indictment or punishment. In order to sustain a criminal prosecution against appellants for the act complained of, it must be shown either that the act involved palpable omission of a duty imperatively required of them by law, which they were without discretion to disregard, or that it amounted to a willful and corrupt abuse of such discretion. The testimony before us may be sufficient to show error in judgment on the part of appellants, and even a stubborn or unreasonable disregard of the arguments and advice of the county attorney to the effect that Eubank's claim should have been rejected, but it wholly fails to prove that, in voting to allow the claim, they acted dishonestly or from a corrupt motive. If the members of the fiscal court are to be proceeded against criminally or in a civil action for damages for mere mistakes in judgment, however hurtful to the public, they would undertake the performance of their official duties in

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a timid and time-serving manner; if, indeed, they would undertake their performance at all.

The lower court should have given a peremptory instruction after the introduction of the evidence in behalf of the Commonwealth, directing the jury to find appellants not guilty, and, because of its failure to do so, the judgment is reversed, and cause remanded for a new trial and further proceedings consistent with the opinion.

CASE 43.—ACTION BY W. S. MOBERLY AGAINST THE RICHMOND TELEPHONE CO. TO COMPEL IT TO COMPLY WITH A CITY ORDINANCE REGULATING TOLL.—June 28.

Moberly v. Richmond Telephone Co.

Appeal from Madison Circuit Court.

J. M. BENTON, Circuit Judge.

Judgment for defendant, plaintiff appeals.—Affirmed.

1. Municipal Corporations—Franchises—Authority to Grant—Sale.—Under Const. Sec. 164, providing that a city may sell franchises at public sale to the highest and best bidder for a term not exceeding 20 years, a city has no power to grant a franchise without offering the same at public sale.
2. Same—Conditions.—A city may annex any lawful condition to the exercise of a franchise granted to a public service corporation, which condition becomes a part of the contract under which it is thenceforth used.
3. Same—Telephones—Regulation of Rates.—Where a city granted a franchise for the operation of a telephone line, it was competent to provide as a condition that the rates for serv-

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ice to citizens should not exceed a schedule fixed in the ordinance, or any future ordinance properly adopted.

4. Telephones—Franchise—Limitation of Charges—Construction. —Where an ordinance granting a telephone company a franchise to operate within a city prescribed that the company should not charge toll in excess of a schedule contained in the ordinance, such schedule was limited to service within the city, and did not preclude the corporation from charging an extra rate for connections outside the city limits.

W. S. MOBERLY for appellant.

1. We contend that appellee had no right under its franchise granted by the city of Richmond to raise the rates on telephones in residences beyond the rate of $1.50 per month and in all other places beyond $2.00 per month, which are the maximum rates allowed under its franchise granted in 1895, under which it was constructed and is operated.

2. It is a settled rule for the interpretation of charters to corporations, that the grant is to be strictly construed in favor of the public and against the grantees.

AUTHORITIES CITED.

C. Y. C., vol. 9, p. 577; Murray v. Carothers, 1 Met., 71; Montgomery v. Firemen's Insurance Company., 16 B. Mon., 427; Hunter v. Miller, 6 B. Mon., 612; Shultz v. Johnson, 5 B. Mon., 497; Hildrith v. Forrest, 4 J. J. Marshall, 217; Triplett v. Gill, 7 J. J. Marshall, 432; Kelley v. Bradford, 3 Bibb., 317; Campbellville Telephone Co. v. Lebanon L. & L. Tel. Co., vol. 80, Ky. Decisions, p. 116; Smith v. Theobald, 86 Ky., 141; Collins v. Alvery, 10 Ky. Law Rep., 985; Barabas Hospital Co. v. Minneapolis Nat. El. Co.; Franklin Telegraph Co. v. Harrison, 145 U. S., 459; C. Y. C., vol. 19, p. 1459; C. Y. C., vol. 10, p. 195; Betram v. Central Turnpike Co., 25 Cal., 283; Hartford Bridge Co. v. Union Ferry Co., 29 Conn., 210; Shorts v. Smith, 9 Ga., 517; Mills v. County St. Clair, 7 Ill., 197;.

J. A. SULLIVAN for appellee.

POINTS AND AUTHORITIES.

1. Contract terminable: Irish v. Dean, 39 Wis., 562; Coffin v. Landis, 5 Pa., 176; Davis v. Barr, 12 N. Y., 111; McLeas v. Hale,

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10 Wendling, 426; Eckels v. New Orleans, 52 Miss., 610; Butler v. Smith, 35 Miss., 457; Chattanooga R. R. Co. v. C., N. O. & T. P. R. R. Co., 44 Fed., 456; Smith v. Cedar Falls R. R. Co., 30 Iowa, 244.

2. The contract as alleged is within the statute of frauds: Smith v. Theobald, 86 Ky., 141; Dickey v. Dickinson, 105 Ky., 748; Stowers v. Hollis, 83 Ky., 548.

3. The franchise granted by the city of Richmond, according to its clear provisions and meaning, undertook to regulate the charge for telephone service only within the corporate limits of the city of Richmond, and the appellee had a legal right under its charter to charge more than that rate for service within and without the city, provided such increase was reasonable: Peobles B. Co. v. Memphis R. Co., 10 Wall, 51; 1 Bouvier, 840; A. & Enc. Law., vol. 17, p. 244; Oregon Railway & Navigation Co. v. The Oregonian Railway Co., 130 U. S., 1; Dillon on Corporations, sec. 420; A. & Enc. Law, vol. 26, pp. 46-600; St. Louis v. Bell. 2 L. R. A., 278; subsec. 25 of sec. 3490, Ky. Stats.

4. The board of Council of Richmond, Ky., had no authority under its charter to regulate charges for telephone service beyond the city limits of Richmond, Ky.: Subsec. 25 of sec. 3490.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

Appellee, as assignee of Powell, is the owner of a franchise to maintain and operate a telephone exchange and telephone system in the city of Richmond. The franchise was granted by the city for a term of 20 years, to occupy its streets, alleys, etc. In the ordinance granting it, it was provided that the grantee should not charge exceeding the schedule of rates fixed in the ordinance for service to the citizens of Richmond. Appellant, a citizen of Richmond, became a subscriber to the system. Later on appellee extended its system into the county beyond the city limits, but connecting with the city exchange. It proposed to charge a higher rate to its subscribers for the privilege of talking to all its subscribers, including those in the county outside the city and those

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inside. Appellant refused to pay the advanced rates, and appellee declined to give him the full service. This suit was brought by appellant to compel appellee to give him the full service by connecting his telephone at his call, or at the call of any of its subscribers, whether they called from boxes in the city, or in the county outside the city. The circuit court sustained a demurrer to the petition, and dismissed it.

Under the present Constitution a city may sell such franchises at public sale to the highest and best bidder for a term of not exceeding 20 years, though they are not exclusive. Without such sale cities may not grant such franchises. Section 164, Const. The city may annex any lawful condition to the exercise of the franchise, which becomes a part of the contract under which it is thenceforth used. And we think it was competent for the city to provide, as a condition of the franchise, that the rates to citizens should not exceed the schedule fixed in the ordinance, or any future ordinance. The real question here is the construction of the franchise granted in this instance. It purported to grant, and could only grant, a franchise operative within the city, The schedule of rates, being silent as to service or tolls beyond the city limits, must be construed with reference to the service to be rendered, or tolls to be charged, within the territory coterminous with the franchise granted. Even though it be conceded that the city could have lawfully imposed the condition to its grant that city subscribers should be charged not exceeding a schedule fixed by the city ordinance for service both in and out of the city, that was not done in this instance. The appellee did not, therefore, violate the ordinance conditioning its franchise when it proposed to charge a higher rate for its county service.

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In this view of the matter, we conclude that the judgment was not erroneous, and it is therefore affirmed.

CASE 44.—ACTION BY MORRIS GRIFFIN'S ADMINISTRATOR AGAINST G. W. HOWE'S EXECUTOR TO RECOVER THE PROCEEDS OF A LIFE INSURANCE POLICY.—June 28.

Howe's Exr. v. Griffin's Admr.

126 373
137 440

Appeal from Montgomery Circuit Court.

A. W. YOUNG, Circuit Judge.

Judgment for plaintiff, defendant appeals.—Reversed.

Contracts—Legality—Fraud—Parties in Pari Delicto.—Where a life policy void as against public policy because the beneficiary has no insurable interest in the life of insured, so that no one is entitled to recover on it, was issued on insured's fraudulent statement in the application that the beneficiary was his creditor to the amount of the policy, and the insurance was paid to the beneficiary, insured's administrator cannot recover it of the beneficiary, on the ground that he holds it as trustee for him; insured and the beneficiary having both participated in the fraud, and there being nothing, outside the fact that he could not write, to show that insured was imposed upon or deceived.

ROBERT H. WINN for appellant.

POINTS AND AUTHORITIES.

1. The petition should have been dismissed; the secondary affidavit demanded by Sec. 3870 of the Statutes, was insufficient because:

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a. The affiant does not disclose any knowledge of the facts: Dewhurst v. Shepherd's exor., 102 Ky., 239.

b. The affidavit was made by an attorney for the plaintiff, employed under a "graduated fee." He was incompetent as a witness, and was interested pecuniarily in the recovery: Smick's admr. v. Beswick's admr., 113 Ky., 439; Trabue's exor. v. Harris, 1 Met., 597; Nutall's admr. v. Brannin's exor., 5 Bush, 11.

2. The court should have required a personal verification of the petition: Civil Code, sec. 117, subsec. 4.

3. The court should have required the petition to be made more specific; it does not allege to whom the Equitable promised to pay the proceeds of the policy.

4. The transaction was a gambling transaction, and void as against public policy: Griffin's admr. v. The Equitable, 119 Ky., 856.

5. Relief will be denied in Kentucky to a participant in a transaction in nature gambling and against public policy: Bromley's Admr. v. Washington Life, 92 S. W., 17; Central Trust Co. v. Respass, 112 Ky., 606; McMullen v. Hoffman, 174 U. S., 639, s. c. 43 L. Ed., 1117.

6. The court, of its own motion, should refuse relief when the fraud appears: Bromley's Admr. v. Washington Life, 92 S. W., 17; Hall v. Coppell, 7 Wall., 559; s. c. 19, L. Ed., 244

7. The action was barred by limitation. It was not brought within five years, nor within one year after the qualification of his personal representative; and Howe's representative had qualified 19 months before the five years elapsed: Ky. Stats., sec. 2528; Pilcher v. McCowan, 8 Ky. Law Rep., 786; Jones v. Mitchell's Admr., 9 Ky. Law Rep., 858; C. & L. R. R. Co. v. Bowler's Heirs, 9 Bush, 485; Duke v. Davis, 101 S. W., 390.

8. The public policy of a state must be deduced from its constitution, its statutes and its judicial records; and each state must necessarily establish its own public policy: Union Central Life Ins. Co. v. Spinks, 83 S. W., 615; Hartford Ins. Co. v. C. M. & St. P. R. R. Co., 70 Fed. Rep., 201 s. c 30, L. R. A., 193; Myers v. Meinrath, 101 Mass., 366, s. c. 3., Am. Rep., 368.

9. No relief will be granted to one as against the other of two jointly engaged in a transaction, in nature gambling or against public policy: Central Trust Co. v. Respass, 112 Ky., 606; Griffin's Admr. v. The Equitable, 119 Ky., 856; Smead v. Williamson, 16 B. Mon., 492; Hocker v. Gentry, 3 Met., 463; Laughlin v. Dean, 1 Duv., 20; Campbell v. Anderson, 2 Duv., 384; Morrison v. Bennett, 20 Mont., 560; s. c. 50 L. R. A., 158; King v. Winant's, 71 N. C., 469; s. c. 17 Am. Rep., 11; Hunter v. Pfeiffer, 108

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Ind., 197; s. c. 9 N. E., 124; Emery v. Ohio Candle Co., 47 O. St., 320; s. c. 24 N. E., 660; Shaffner v. Pinchback, 133 Ill., 410; s. c. 24 N. E., 867; Morgan v. Groff, 5 Denio, 364; s. c., 49 Am. Dec., 273.

10. Ex dolo malo non oritur actio. No right of action can arise out of a fraud; nor can one recover when he must disclose his own moral turpitude as a prerequisite to a recovery: McMullen v. Hoffman, 174 U. S., 639, s. c., 43 L. Ed., 1117; Holman v. Johnson, 1 Cow., 341; Hall v. Coppell, 7 Wall., 558, s. c. 19, L. Ed., 244; Hayne v. Rudd, 102 N. Y., 372, s. c. 7 N. E., 287; Embrey v. Jemison, 131 U. S., 336, s. c., 33 L. Ed., 172; Babcock v. Thompson, 3 Pick., 446, s. c., 15 Am. Dec. 235; Pomeroy's Equity, 2d ed., vol. 1, sec. 401; Pomeroy's Equity, 2d ed., vol. 3, sec. 938.

11. The doctrine of the last foregoing paragraph has been unequivocally adopted, as the settled public policy of Kentucky; Kimbrough v. Lane, 11 Bush, 556; Davezac v. Seiler, 12 Ky. Law Rep., 599; Smith v. Richmond, 70 S. W., 846, s. c. Ky. Law Rep., 1117; Chapman v. Holly, 80 S. W., 190, s. c.25 Ky. Law Rep., 2183.

12. A defendant under an action for money had and received can only be held to answer for what he has received. If Howe's estate owes anything, it owes only one-half the proceeds of the policy: Limited Investment Assn. v. Investment Assn., 99 Wis., 54, s. c. 74 N. W., 633; Blackstone, vol. 2, p. 443.

13. There can arise no implied contract in favor of Griffin's estate. If there is any obligation upon the part of Howe's estate to refund, it is to the Equitable, the party defrauded: Griffin's Admr. v. The Equitable, 119 Ky., 856.

JOHN A. JUDY and HAZELRIGG, CHENAULT & HAZELRIGG for appellee.

The doctrine that the courts will not aid a plaintiff who is pari delicto with the defendant, is not a rule of universal application. It is based on the principle that to give the plaintiff relief in such cases would contravene public morals and impair the good of society; therefore the rule should not be applied in a case in which to withhold the relief would to a greater extent offend public morals. To promote the good of the public is the highest aim of the courts in the application of this doctrine.

AUTHORITIES CITED.

Howard's Admr. v. Leavell's Admrx., 10 Bush, 482; Griffin's Admr. v. Equitable Assurance Society, 84 S. W., 1164; Beard v.

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Sharp, 18 Ky. Law Rep., 1029; 9 Cyc., 550; Bacon on Benefit Societies & Life Insurance, secs. 250b and 397; Mutual Life Ins. Co. v. Blodgett, 27 S. W., 286 (Texas case); Bigelow on Fraud, p. 203; Pomeroy's Equity Jurisprudence, secs. 941 and 942; Anderson's Admr. v. Meredith, 6 Bush, 622; Civil Code, sec. 80; Field v. Wallace's Admr., 6 Monroe, 334.

OPINION OF THE COURT BY WM. ROGERS CLAY, COMMISSIONER—Reversing.

This is an action by John Hays, as administrator of Morris Griffin, deceased, appellee against John G. Winn, executor of C. W. Howe, appellant, to recover the proceeds of a policy of insurance for $9,500. which was issued upon the life of Morris Griffin by the Equitable Life Assurance Society and made payable to Howe & Johnson, a firm composed of J. G. Johnson and C. W. Howe.

The petition alleges that on the ——— day of April, 1893, Morris Griffin made a written application to the Equitable Life Assurance Society for a policy of insurance to be issued upon his life for the sum of $9,500, to be made payable to Howe & Johnson, which firm was composed of C. W. Howe and J. Gano Johnson, and that upon said application to said Equitable Life Assurance Society a policy of insurance upon the life of said Morris Griffin was issued, by which and in which it, in consideration of the advanced payment of $266 and of an annual payment of $266 to be made thereafter at the office of the society in the city of New York on or before the 24th day of April of each year during the continuance of the contract, promised to pay the sum of $9,500, upon satisfactory proof of the death of Morris Griffin of Mt. Sterling, Ky.; that all of the premiums upon said policy were paid for and in the name of said Morris Griffin, but were paid by said Howe & John-

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son, and the premiums were all paid upon the 24th day of April up until said Griffin's death; that, while the application stated on its face that said Howe & Johnson were creditors of Griffin, they were not in fact creditors of his except in the sum of about $300, of which amount $266 was loaned him to pay said premium, and the balance was for merchandise furnished said Griffin; and that the said Howe & Johnson had no insurable interest in the life of said Griffin other than as creditors, and had no greater insurable interest in his life than the sum so loaned and the value of the merchandise so furnished; that said policy was held by said Howe & Johnson in trust for said Griffin and his estate, and to secure to them the amount owing them by said Griffin with legal interest thereon; that after the death of said Griffin satisfactory proof was presented of the death of said Griffin to the Equitable Life Assurance Society, whereupon it paid to the said Howe & Johnson on the 15th day of August, 1900, the proceeds of said policy in the sum of $9,361.58, found to be due on said policy, all of which said sum was paid to said Howe & Johnson in trust for said Griffin's estate, except to the extent of the money loaned and the value of the merchandise so furnished, which amounts were due to Howe & Johnson; that the said Howe and Johnson, nor either of them, have ever paid the appellee the proceeds of said policy or any part thereof, and wrongfully withhold said sum from this plaintiff. After certain preliminary motions, which it will not now be necessary to consider, appellant filed a demurrer to the petition, which was overruled by the court. Thereafter appellant filed an answer in eight paragraphs. Paragraph 1 is a traverse, based upon appellant's want of information and

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belief of the facts set out in the petition. In view of the conclusion reached by the court, it will not be necessary to set forth the defenses contained in paragraph 2, 3, 4, 5, 7, and 8. Paragraph 6 is a plea of fraudulent conspiracy on the part of Griffin, Howe, and Johnson, by which they deceived the Equitable Life Assurance Society and induced it to believe that said Howe & Johnson were creditors of said Griffin, when in truth they were not his creditors in any sum. Said paragraph further states that the consideration which moved Morris Griffin to enter into said conspiracy was the issuance of an insurance policy on said Griffin's life in the sum of $500, to be made payable to said Griffin or his wife and children, who were dependent on him, and that the said Howe & Johnson agreed to and did maintain and keep alive said $500 policy until it became a claim against the Equitable Life Assurance Society which issued it. Demurrers were sustained to the second, third, fifth, sixth, and eighth paragraphs of appellant's answer. A motion to make more specific paragraph 4 was sustained and appellant declined to plead further, and the fourth paragraph was stricken from his answer. The net result of these steps was to eliminate all defensive matter, save the traverse of the petition and the counterclaim and set-off of the premiums paid. By agreement the case was then transferred to the equity docket, and an agreed state of facts was filed. From the agreed state of facts we gather the following undisputed points: (a) "On the 24th day of April, 1893, Morris Griffin made a written application for a policy of insurance to be issued upon the life of said Morris Griffin, for the sum of $9,500, payable to Howe & Johnson." Then the aplication is inserted in full. (b) In answer to

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question 1 on page 2 of the application, as to the relationship of the beneficiaries, Howe & Johnson, to Griffin, the latter's answer is "Creditors." (c) Then the following question: "Has the person in whose favor the assurance is to be effected an interest in the life of the assured equivalent to the amount of the assurance applied for?" Griffin's answer is "Yes." (d) A policy of insurance for $9,500, upon the life of Griffin was issued by the Equitable, and made payable to Howe & Johnson. This policy is set forth in the agreed facts. (e) The amount of premiums paid by Howe & Johnson and the dates when the payments were made are fixed. (f) The proceeds of the policy amounting to $8,728.22 were paid to Howe and Johnson (Griffin having died) on August 15, 1900. (g) Neither Howe nor Johnson was a creditor of Griffin, and neither had any insurable interest in his life. From the above it will be seen that Griffin made a written application for the insurance; that he represented Howe & Johnson, not only as creditors, but creditors to the full amount of the insurance applied for. Griffin's consent was necessary in order to obtain the insurance. When he signed the application and stated that Howe & Johnson were creditors to the full amount of the policy, when they were in fact not creditors at all, he knew as well as they that it was a lie and a fraud upon the Equitable Assurance Society. These facts taken alone are sufficient to show the fraudulent character of the scheme which they had devised for the purpose of cheating the insurance company. With this view of the record, it will not be necessary to discuss the propriety of the trial court's action in sustaining the demurrer to the sixth paragraph of appellant's answer, but the rights of the parties to this action

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may be determined by the agreed facts which appear in the record, for this court has, in the case of Bromley's Administrator v. Washington Life Insurance Company, 122 Ky. 402, 28 Ky. Law Rep. 1300, 92 S. W. 17, 5 L. R. A. (N. S.) 747, laid down the doctrine that, "if a contract is against public policy, the court will not lend its aid to its enforcement. The defense need not be pleaded. If at any time it appears in the progress of the action that the contract sued upon is one which the law forbids, the court will refuse relief." The only question, therefore, to be determined, is whether or not the admitted facts show a contract that is against public policy.

Prior to the institution of this action appellee instituted suit in the Lawrence circuit court against the Equitable Life Assurance Society for the purpose of recovering upon the same policy upon which suit was brought in this action. That case was before this court and is reported in Griffin's Adm'r v. Equitable Life Assur. Society, 119 Ky. 856, 84 S. W. 1164, 27 Ky. Law Rep. 313. It was decided in that case that the Equitable Life Assurance Society was not liable to Griffin's administrator on two grounds: First. That the Equitable Life Assurance Society, in ignorance of its rights and by mistake, had paid the proceeds of the policy to Johnson & Howe, without any knowledge of the fact that they were not creditors. Second. That the transaction was clearly a speculation upon the hazard of human life, and consequently a gambling scheme, pure and simple, which rendered the policy void, because against public policy. This court has determined, therefore, that the policy sued upon in this action is void as against public policy; and, if Griffin's administrator could not recover on that policy, it neces-

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sarily follows then that, if the Equitable Life Assurance Society had not paid the proceeds of the policy to Johnson & Howe, neither of them could have recovered upon it. That being the case, we are unable to see upon what principle of law a right of action arises in favor of Griffin's administrator against Howe's executor to recover money to which neither is entitled. In the case of Smead v. Williamson, 16 B. Mon. (Ky.) 492, wherein one of the parties transferred his property to another to avoid the payment of his debts, this court said: "It is a contract in violation of good morals, inconsistent with honest purposes, and therefore against public policy, and not countenanced by the law nor by the tribunals which administer the law. To such a transaction the maxim applies, 'Ex turpi causa non oritur actio.' From such a foundation no cause of action can arise; and this is true, not only as to any action for the enforcement or for a breach of the vicious contract itself, but also as to any action by which either party may attempt to regain from the other what, by reason of the invalidity of the transaction as to third persons, he may have lost for the benefit of the other party, and he could not sustain an action either on the contract or for its breach, or on any implied liability to refund what he had paid on it. The law regarding both parties as equally implicated in the illegal transaction will not interpose in behalf of one of them, either to enforce the illegal contract or to relieve him from the consequence of either a partial or a full performance of it." In the case of Chapman v. Haley, 117 Ky. 1004, 25 Ky. Law Rep. 2182, 80 S. W. 190, wherein the plaintiff sought to recover $300 from one who had induced him to pay it in purchase for counterfeit money, which was never

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delivered, this court said: "It is unnecessary to say that this conspiracy between these two men to purchase counterfeit money constituted an illegal transaction and was void. (The facts of the Highwayman Case are then set forth.) Taken as a whole, we do not believe that the books disclose a parallel in audacity to the case at bar, saving always the history of the dark-lantern firm of Hounslow Heath, detailed above; that a like judgment did not overtake the parties litigant here, as dissolved the ancient partnership, marks the lapse of our modern procedure from the vigorous integrity with which the ancient judges administered the common law in its primitive virtue." Additional authorities might be cited, but these are sufficient to show the principle of law applicable to this case.

Counsel for the appellee, however, insist that the contract of insurance in this case should not be held to be void as against public policy, claiming that it would better comport with sound public policy to require the executor of Howe's estate to pay over the money to the widow and children of Morris Griffin. We are unable, however, to take this view of public policy. We think, if two parties enter into a fraudulent conspiracy to cheat a life insurance company, it should be held, first, that neither one of them can recover of the insurance company, and, second, that, if either one of them should obtain the proceeds of the policy, the other can, under no circumstances, recover of him. Thus the chances of either obtaining the proceeds will be rendered as remote as possible by making each guilty participant understand that at no stage of the proceeding can he invoke the aid of the law.

Counsel for appellee further contend that Howe

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being a participant in the fraud, and the Equitable Life Assurance Society having paid the money to Howe & Johnson without knowledge of the fraud, and without availing itself of the plea it could have made, Howe's administrator has no right now to set up such a defense. If this be true, then Griffin's administrator would be without a cause of action, for it would be impossible for him to recover without proving that Howe & Johnson were not creditors, when the application, which he signed, alleged that they were. We do not accede to this doctrine, however, for, as has well been said in the case of Hall v. Coppell, 7 Wall. (U. S.) 558, 19 L. Ed. 244, and cited with approval by this court: "The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, 'Ex dolo malo non oritur actio,' is limited by no such qualification. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation." Counsel for the appellee further invokes the doctrine laid down in the case of Anderson's Administrator v. Merideth, 82 Ky. 564, 6 Ky. Law Rep. 622, wherein this court said: "Where there is imposition, duress, oppression, threats, undue influence, taking advantage of necessity, or weakness, the party thus placed at disadvantage, although participating in the fraud, may be relieved in a court of equity as against his co-wrongdoer." For the purpose of applying this rule to this case, counsel for appellee call at-

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tention to the fact that Morris Griffin could not write, but signed his name to the application by making his mark. Aside from this one thing, there is nothing else in the record to show that Griffin was a mere creature of Howe & Johnson, or that he was subject to their control and dominion. The petition does not allege, nor is it shown in the agreed facts, that Griffin was mentally weak, or that he was imposed upon by either Johnson or Howe, or that any fraud was practiced upon him. This court will not conclude from the mere fact that he was unable to write his name that he was deceived or imposed upon. Many of our worst criminals have been men who could neither read nor write. In the absence of anything to the contrary in the record, we must assume that Griffin, Johnson, and Howe were all equally guilty. That being the case, there is certainly nothing upon which may be based the doctrine invoked by counsel for appellee.

Counsel for appellee cite a number of authorities to the effect that the designation of a beneficiary outside the prescribed class does not render the policy void, but merely renders that designation invalid, but, as was said by this court in the case of Griffin's Adm'r v. Equitable Life Assurance Society, supra: "It will be found, however, that these were all cases of benevolent aid societies, the charters of which provide that only members of the family of the insured could be the beneficiaries of the insurance. Therefore the opinions hold that, where one was named as the beneficiary in a certificate or policy issued on the life of a member of the society to whom it would be ultra vires for the society to pay the insurance because not a member of the class authorized by the charter to be beneficiaries, the

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insurance should nevertheless be paid to the persons authorized by the charter." In other words, with very few exceptions, the doctrine goes to this extent: That where the insurance company pays the money to the beneficiary, who has no insurable interest in the life of the assured, he simply holds the proceeds as trustee for the party who is entitled to the proceeds. In the case under consideration, however, neither the beneficiary nor the insured is entitled to the proceeds. The money paid to Howe & Johnson is in good morals the money of the Equitable Life Assurance Society. How, then, can a right of action arise in favor of Griffin's administrator as against Howe's executor to recover money which rightfully belongs to some one else?

Holding that the contract of insurance is void as against public policy, and that the parties who obtained it participated equally in the fraud by which it was obtained, and that appellee, therefore, has no cause of action against appellant, judgment herein is reversed, and cause remanded, with directions to the trial court to dismiss the petition.

O'REAR, C. J., not sitting.

Petition for rehearing by appellee overruled.

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CASE 45.—PROCEEDINGS BY THE COMMONWEALTH BY THE AUDITOR'S AGENT TO COMPEL THE LISTING OF PROPERTY OF THE WIDOWS' AND ORPHANS' OF ODD FELLOWS.—June 28.

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Widows' and Orphans' Home of O. F. v. Commonwealth

Appeal from Fayette Circuit Court.

WATTS PARKER, Circuit Judge.

Judgment for plaintiff, defendant appeals.—Reversed.

Taxation—Exemptions—Charitable Institutions.—A corporation whose sole object is to provide a suitable home for the destitute widows and orphans of deceased members of a certain secret society of the State, is an "institution of purely public charity," within the meaning of Const. Sec. 170, and its property is exempt from taxation.

JOHN S. GRANT for appellant.

We insist that every incentive and motive that should influence good citizens in seeking a higher and better citizenship is sought and worked for by this institution, and that instead of burdening it with taxation the public should be willing to assist them in accomplishing this object in every way they can, and in considering the appellant not only as a purely public charity, but also its educational features, it should not be burdened with taxation: Trustees, etc. v. Taylor, Receiver, 25 Atl., 56; Fire Ins. Patrol v. Boyd, 120 Pa. Stats., 624; Widows' and Orphans' Home v. Bosworth, 25 Ky. Law Rep., 1505.

HOBBS & FARMER for appellant.

Brief not in record.

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GEORGE R. HUNT for Commonwealth.

AUTHORITIES CITED.

An institution intended to provide a home for destitute widows and orphans of deceased Odd Fellows of the State, and such other persons as that order may commit to its charge is a private charity and, therefore, not exempt from taxation under Sec. 170 of the Constitution, exempting from taxation institutions of purely public charity: Widows' and Orphans' Home of Odd Fellows v. Bosworth, Sheriff, 112 Ky., 200.

OPINION OF THE COURT BY JUDGE BARKER—Reversing.

This was a procedure by the Auditor's agent of the State of Kentucky, under the statute, to compel the listing, as omitted property, of a note for $4,000 owned by the appellant, the Widows' and Orphans' Home of the Odd Fellows of Kentucky. The one question arising for adjudication upon the record before us is whether or not the property of the appellant corporation is immune from taxation under that provision of section 170 of the Constitution which exempts "institutions of purely public charity." In other words: Is the appellant corporation an "institution of purely public charity?"

The object of the institution, as shown by its constitution, is to provide a suitable home for the destitute widows and orphans of deceased Odd Fellows of Kentucky. There is no dispute as to the facts of the case, upon which the question of law before us must turn. We copy the following excerpt from the answer, which is not denied: "It further says that it is the owner of a parcel of real estate consisting of 30 acres, a part of which is in the city of Lexington, and part in the county of Fayette, and being located at the head of West Sixth street in the city of Lex-

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ington, known as the 'McMichael Place.' It further says that upon said real estate there are two houses, one a three-story and the other a four-story house, and said houses contain 107 rooms, including halls and cellar. That said land and said houses are used solely and alone for the purpose of caring for widows and orphans of deceased Odd Fellows of Kentucky. That there are now in said home and being cared for, boarded, clothed, educated, and trained for useful citizens, 61 children who are orphans of deceased Odd Fellows of Kentucky, and who have no means of support other than that furnished to them by defendant, and, in addition to said 61 children, there are 2 widows of deceased Odd Fellows who are indigent, old, and unable to protect or care for themselves, who are being maintained and cared for by defendant, being totally dependent upon the defendant for their support, and said children range in age from two and one-half years to sixteen years of age. It further states that, after its institution, it took some three or four of said children, from county and city institutions of charity, where they were being cared for by the counties or cities, and that in caring for said children and widows this defendant has relieved the said counties and cities from the burden of supporting, maintaining, and educating said chlldren. That this defendant is engaged in a work of purely public charity, and that there are no religious, political, or sectarian rules adopted or prescribed for the admission of widows and orphans to said home. That the children in said home are permitted to go to whatever church they or their relatives may desire them to attend. That there is no creed or dogma of any church or denomination in said home. That Americans, Jews, Italians, or any children of th-

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white or Caucasian race, if their father was a member of an Odd Fellows' Lodge in the State of Kentucky, are eligible to admission in said home. It further states that there is no person or persons who receive compensation or derive profit from the defendant corporation. That said board of directors elect a president, vice president, secretary, treasurer and superintendent. That the president, vice president, secretary, treasurer, and superintendent serve without compensation, and receive no pecuniary remuneration for their services, and there is no one who receives a salary who is connected with the management of said home and running same, except those who are in immediate charge of said home, and devote all of their time to the nurture and care of said children, to-wit, the manager and the matron, who are husband and wife, and live in the home and devote their entire time to the caring for the inmates of said home, and other employes who are necessary to properly care for the said inmates of the said home. It further says that it is an institution of purely public charity, and that no persons receive or derive any profit from it."

The question, then, is whether an institution whose charitable work is based upon the foundation shown by the foregoing excerpt from the answer is a "purely public charity." It may be admitted at the outset that the expression "purely public charity" is one which has not been uniformly defined by the courts before which it has come for construction, either under our own Constitution or under the Constitution of states having the same provision with reference to exemption from taxation as our own. The expression first came on for definition in our own state in the case of Trustees of Kentucky Female

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Orphan School v. City of Louisville, 100 Ky. 470, 19 Ky. L. R. 1916, 36 S. W. 921, 40 L. R. A. 119. The Kentucky Female Orphan School is a charitable institution located at Midway, Ky., conducted under the auspices of the Christian Church, and in all substantial respects the question which we have here was presented there, and of necessity there arose the question of the meaning of the expression "purely public charity." The following excerpt from a case decided by the Supreme Court of Pennsylvania (Episcopal Academy v. Philadelphia, 150 Pa. 565, 25 Atl. 55) was quoted in the opinion with approval: "(1) Whatever is done or given gratuitously in relief of the public burdens, or for the advancement of the public good, is a public charity. Where the public is the beneficiary, the charity is public, and where no private or pecuniary return is reserved to the giver or to any particular person, but all the benefit resulting from the gift or act goes to the public, it is a purely public charity; the word 'purely' being equivalent to wholly. (2) A denominational school property, vested in trustees for the purpose of affording encouragement to the education of youth, is a purely public charity, although the school is not open in the same way to the general public as to persons connected with the religious denomination, but the general public are admitted as vacancies occur, and, when admitted, upon the same term with all other pupils. (3) An institution founded and endowed as a purely public charity does not lose its character as such under the tax laws if it receives a revenue from the recipients of its bounty sufficient to keep it in operation." The court also cites with approval the opinion in Burd Orphan Asylum v. School District of Upper Darby, 90 Pa. 21, as upholding the same principle announced in the

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excerpt first quoted. In the last-named case a testatrix by her will had provided for the establishment of an asylum whose object was to maintain and educate white female orphan children "who shall have been baptized in the Protestant Episcopal Church in the city of Philadelphia, or in the state of Pennsylvania;" and this was held to be a "purely public charity," under the Constitution of Pennsylvania, which is identical with our own on this subject. In the case of Gerke v. Purcell, 25 Ohio St. 229, this definition of a "purely public charity" is given: "When the charity is public the exclusion of all idea of private gain or profit is equivalent in effect to the force of 'purely,' as applied to public charity in the Constitution." The case of Donohugh v. Library Company, 86 Pa. 306, and Philadelphia v. Women's Christian Association, 125 Pa. 572, 17 Atl. 475, maintain the same doctrine. In the case of Zable v. Louisville Baptist Orphans' Home, 92 Ky. 89, 13 Ky. L. R. 385, 17 S. W. 212, 13 L. R. A. 668, it is said: "It is the duty of the State to care for its indigent orphans, and, if done by another, he renders what is properly a public service, and the Legislature may therefore, without regard to the extent of it, exempt the property devoted to such use from taxation." In the case of Norton's Ex'rs and Trustees v. City of Louisville, 118 Ky. 836, 82 S. W. 621, 26 Ky. L. R. 846, was involved the question we have here. The charity of the defendant corporation, whose property was sought to be taxed by the municipality, was limited by the following language of its charter: "The object of this corporation shall be to procure the control of orphans and destitute children of Baptist parents, and of such other destitute and helpless children as the managers may think proper to receive, for the

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purpose of supporting and educating them in an institution to be prepared and provided for that purpose by said managers. * * *" It was there held that the institution in question was a purely public charity. In the case of Commonwealth v. Thomas, Trustee, 119 Ky. 208, 83 S. W. 572, 26 Ky. Law Rep. 1128, we thus defined the expression "purely public charity," as contained in the Constitution: "Without undertaking to be technically accurate, a 'purely public charity' may be defined as one which discharges, in whole or in part, a duty which the Commonwealth owes to its indigent and helpless citizens. Undoubtedly, it is the duty of the State to educate its poor children, and thus fit them for discharging the duties of citizenship; to care for the indigent insane, its helpless orphans, and its poor who are sick and afflicted; and therefore any institution which, serving no selfish interest discharges, in whole or in part, any such duty, is a 'purely public charity.' Under this head would come schools for orphans, the property of the organization known as the Young Men's Christian Association," etc.

When section 170 of the Constitution was before the convention for adoption, many of the members were apprehensive that the expression "purely public charity" was too narrow that, under it just such institutions as the one involved here would be taxed. This position was combated by one of the most distinguished lawyers in the convention, and in a speech which he delivered in support of the adoption of the section he used the following language: "It is objected that the language which provides that institutions of 'purely public charity' shall be exempted from taxation is too limited in its meaning. It has been said, if this section is adopted, that the Masonic

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Widows' and Orphans' Home of Louisville, the Baptist Orphans' Home, and other similar charities, will be taxed. I deny it, and, if I believed for one moment that the Masonic Widows' and Orphans' Home at Louisville, or the Little Sisters of the Poor, or other institutions of a like character throughout the State would be taxed by this section, I would be ashamed to record my vote in its favor. What is an institution of 'purely public charity'? It is some place owned or given or donated for a charitable purpose, and where persons receive benefit without cost to them, and which is not run for private gain or profit. The Masonic Widows' and Orphans' Home, and other institutions of that character in this State, are clearly objects of purely public charity. The charity may be limited to certain persons—such as the children and widows of deceased Masons, or orphans of deceased Odd Fellows, or children of a certain denomination—but the courts of other states, in whose Constitutions may be found this precise language, have held that institutions of this kind ought not to be taxed, and could not be taxed, because they were places of purely public charity; because they were, in the first place, affording certain persons, without any tuition fee or expense whatever, the means of obtaining an education or a livelihood; and in the second place, no person whatever derived from them any gain or profit. It has also been said that parochial schools owned by private denominations, but from which no gain or profit was derived by any person, and where no fee was exacted to enter, came under the head of purely public charities, and I am satisfied that the enlightened jurists who preside in the courts of our State would give to the language 'purely public charity' its broadest and most liberal mean-

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ing, and would construe it as it has been by the able courts of our sister states; and, that being so, no gentleman on the floor of this convention need have any fear in his mind about taxing these institutions that are maintained by charity, and from which no gain or profit is derived, and which are a credit to our State, and an honor to its generous people." Debates Constitutional Convention, p. 2499. In the same debate, another distinguished lawyer cited and read long excerpts from the several cases decided by the Supreme Court of Pennsylvania, which are approved in Trustees of Kentucky Female Orphan School v. City of Louisville, supra, as showing the construction which had been given the expression "purely public charity" by the highest court of the State of Pennsylvania, whose Constitution, as said before, on the subject in hand, is identical with ours, and includes within its meaning such institutions as that at bar; and with this judicial construction before them the convention adopted section 170, with its exemption of "institutions of purely public charity."

We recognize that the language used by the members of a constitutional convention in debate does not afford the best criterion for the proper construction of the Constitution which is the subject of the debate; but it sheds some light, and we think the fact that the decisions of the Supreme Court of a sister state, construing language identical with that which the convention had before them, was read to the convention, and afterwards it adopted the particular language without change, ought to have some weight in reaching the conclusion that the definition given by the judicial tribunals of the sister state was the meaning which the convention intended should be placed upon the expression under consideration. It

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is a well-established principle of statutory construction that, where any particular language or phrase has received a definite judicial construction, and is afterwards re-enacted, the judicial construction is presumed to be read into the new statute as a part of it; and this rule has been carried to the extent that, where a statute of one state which has received a settled judicial construction is enacted by another state, the construction is adopted as a part of the act. In speaking of this principle, Endlich, in his work on the Interpretation of Statutes, says: "One of the most important bearings, possibly extensions of the rule in question, is its application to statutes transcribed from the statute book of another state or nation. Thus it has been held that, where Congress or the Legislature of a state enacts a statute which is a transcript of an English act that has received a known and settled construction by the courts of that country, that construction, at the time of such enactment, is to be deemed as accompanying and forming an integral part of the same. And the same rule applies as to statutes copied from the statute books of other states. Indeed, it is laid down that, whether passed by the Legislature of the same state or country, or by that of another, the terms of a statute which have acquired a settled meaning by judicial construction are, when used in a later one, to be understood in the sense so attributed to them."

It is earnestly insisted that, in the phrase under consideration, the word "purely" qualifies and limits the word "public," and that no charity is to be considered "purely public," in which the general public is not permitted, at least in theory, to participate; that a charity which is limited by the terms of its organization or endowment to one class or sect of the

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community is a private charity, and therefore not exempt from taxation. In this view we cannot concur. Not only is it opposed to the meaning of the phrase as interpreted by our own opinions above cited, but it is opposed to the manifest spirit and intention of the Constitution itself. No one will dispute that it is the duty of the State to support and educate its destitute orphan children. This is incumbent upon the State, not only because of the duty owed to the children, to rear and educate them into useful men and women, but because of the duty owed to the public at large that they shall not be allowed to degenerate by neglect into criminals, and thus become a menace to the peace and safety of the community, and an enduring burden upon the public anxiety and treasury. This being true, how must this public duty be performed? Manifestly, either by an involuntary system of taxation upon the property of all the citizens in the State or the taxing district wherein the charity is to be maintained, or by the voluntary contributions of the charitable portion of the community, an example of which is afforded in the institution under discussion. Now, it is obvious that every dollar contributed by individuals, intelligently expended in maintaining such institutions as we are now contemplating, is a dollar saved to the general public, who would otherwise be forced to raise it by voluntary taxation. This being true, it is clearly to the interest of the State to foster and encourage voluntary contributions to be used in bearing the public burdens. Every dollar so raised is a gift to the State, for it discharges a debt due from it to the needs of its destitute children. Is it possible, then, that the framers of the Constitution, who were wise and patriotic men, meant to discourage gifts to the

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State by levying an ad valorem tax on the gift? As a financial scheme, this might find a parallel in a tax on bequests endowing public schools, but not short of it. We do not believe the convention meant to station a taxgatherer at the door of the human heart, and thus confine charity a prisoner in her own home. The convention meant by the word "purely" to describe the quality of the charity, rather than the means by which it is administered, that it should be wholly altruistic in the end to be attained, and that no private or selfish interest should be fostered under the guise of charity; but it was never meant that, because a charity was limited by its terms to objects belonging to a certain sect or fraternal order, or color or class, it was a private, and not a public, charity. The members of the convention were wise and practical, and knew that men, as a rule, administer their charity through the organization or organizations to which they belong. Thus, Catholics will naturally distribute their charity through the organization of the Catholic Church; Presbyterians through those of the Presbyterian Church; Masons through the organization of the Masonic Order, etc., etc. But, while each is discharging for the State a particular and limited part of its duty to the objects of the public's bounty, together they are fulfilling the State's whole duty far more completely and efficiently than could be done by means of a system of involuntary taxation administered through the hands of hired officialism. The difference between these two systems— the one actuated by love, and the other serving for pay—is as marked as the difference betwen the ministrations of a mother at the bedside of her sick child and that of a hired nurse. If one fixes his eye narrowly on the work of only one of the various bodies and organ-

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izations engaged in relieving the necessities of misfortune, he might reach the conclusion that it was not a public charity, because limited (in theory, never in actuality) to the members of the particular order or body; but he would make the mistake of one who would conclude that, because a regiment of a battle line had a flag bearing a name or number different from the other flags in the line, it was not a part of the army as a whole, and was not engaged with the other regiments in the mutual purpose of resisting the common enemy. The charities of the various religious and fraternal organizations we are contemplating may seem, when viewed separately and with a narrow and atrabilious vision, to be too limited in their ministrations to be called public; but, when vewed as a whole, the compass of their good work is as wide as the circle of human suffering, and as universal as the love of the heart of man.

Seeing, then, that the various charities, which the generous portion of the community administer through the separate organizations to which the donors belong, as a practical proposition cover the whole field of the State's duty to her indigent and helpless citizens, and that they together contribute to the whole public burden, where would be the wisdom in discouraging such charity? And what good purpose can be subserved by indulging in a strained construction of a phrase in order to reach the conclusion that the members of the constitutional convention meant to throw away as useless the powerful aid which the State could otherwise enjoy in the contributions of charitable men? What good purpose is subserved in attaching the word "private" to the charity of Catholics for Catholics, Presbyterians for Presbyterians, Masons for Masons, or Odd Fellows

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for Odd Fellows? Are the poor and helpless of these various bodies and organizations any less worthy, or any less a part of the public, because they are also members of the particular church or society to which they belong? Are not all charitable institutions necessarily limited to the relief of only a small part of the destitute public? Can any one institution administer to the wants of all? And, if this be true, is it necessary to brand as "private" a charity which, by its terms, marks out a particular part of the public field in which it is to be administered? Who would say that an orphan asylum endowed for the benefit of colored children only was a private charity, or that an orphanage for destitute white children only was not public? And yet the operation of each would be exclusive of a large portion of the community. Who would say that a home for poor and aged men was a private charity, or a home for poor and aged women was not a public charity, although manifestly excluding, the one of the female, and the other the male, indigent, from participation in the bounty?

We are of opinion that the framers of our fundamental law were practical statesmen, and they desired to avail themselves of all the benefits to be derived from the natural impulses of the charitable hearts of the citizens of the State; that they recognized that this benefit would be most certainly received if charity was allowed to flow through its natural channels, which are the organizations to which the donors belong; and that it was well recognized and understood that the general result would be that all, or nearly all, of the State's destitute, would thus be cared for far better than by the State's undertaking to maintain them by a system of involuntary taxation.

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And we cannot believe that these wise and practical statesmen meant to tax the contributions of charity which so certainly take the place of taxation itself. To tax the contributions of charity for maintenance of the State's poor and helpless in wisdom is on a parity with the taxation of the money raised by the State by taxation for the same purposes. In other words, it would be taxing the proceeds of taxation. If we would realize what benefit the State derives from the charitable contributions of individuals, let us imagine that all of the institutions in the Commonwealth such as that at bar were closed, because the contributions sustaining them were withdrawn, and then calculate what would have to be raised by involuntary taxation either to support the charities, or to erect new jails, penitentiaries, and gallows to restrain and punish the additional crime with which the community would be inundated by the immense increase of the criminal classes. Those who contend for the construction rejected by this opinion would stand aghast at such a consummation. It is not believed that any one would uphold such a construction, but for his well-founded belief that no adverse legislation can check the dynamics of love, and that the additional benefit the selfish would obtain by taxing the proceeds of charity will be borne by the generous, rather than that the deserving poor should suffer. The case of Widows' and Orphans' Home of Odd Fellows v. Bosworth, Sheriff, 112 Ky. 200, 65 S. W. 591, being out of harmony with the views herein expressed, is overruled.

The judgment taxing the appellant's property is reversed, with directions to dismiss the proceedings against it.

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DISSENTING OPINION BY JUDGE HOBSON.

The court quotes from Kentucky Female Orphan School v. Louisville, 100 Ky. 470, 19 Ky. Law Rep. 1091, 36 S. W. 921, 40 L. R. A. 119, but it ignores the fact that that case, as was held in City of Newport v. Masonic Temple Ass'n, 108 Ky. 341, 21 Ky. Law Rep. 1785, 56 S. W. 405, 49 L. R. A. 252, involved an educational institution and turned upon other grounds. In Norton's Ex'r v. Louisville, 118 Ky. 836, 82 S. W. 621, 26 Ky. L. R. 846, the charity was not limited to any sect or class, but was for "such other destitute and helpless children as the managers may think proper to receive." See Episcopal Academy v. Philadelphia, 150 Pa. 565, 25 Atl. 55. In Com. v. Thomas, Trustee, 119 Ky. 208, 83 S. W. 572, 26 Ky. Law Rep. 1128, the fund was set apart for the preaching of the Gospel. There was no limitation to any class. The court gravely quotes from certain cases in Pennsylvania. The Constitution of that state is like ours, and these declarations would seem therefore apposite. But the court ignores the fact that the courts there have discarded the dicta quoted, and that in Pennsylvania institutions like appellant are taxed. See Philadelphia v. Masonic Home, 160 Pa. 572, 28 Atl. 954, and cases cited. The court also quotes from an Ohio case, and in like manner ignores the fact that the authorities in Ohio are in accord with those in Pennsylvania. Gerke v. Purcell, 25 Ohio St. 229; M. S. Lodge v. Mayslip, 23 Ohio St. 144. The case of Zable v. Louisville Baptist Home, 92 Ky. 89, 13 Ky. Law Rep. 385, 17 S. W. 212, 13 L. R. A. 668, was decided before the adoption of the present Constitution, and therefore is not in point. These are all the authorities relied on for overruling a previous decision of

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the court, except the speech of one of the delegates in the constitutional convention. In Cooley on Constitutional Limitations, side page 66, it is sad as to the value of the debates in the convention: "Where the question is one of abstract meaning, it will be difficult to derive from this source much reliable assistance in interpretation." The reason is plain. It is the people's Constitution. They accept it upon its terms, "and it is not supposed that they have looked for any dark or abstruse meaning in the words employed." The court gravely asks: "Are not all charitable institutions necessarily limited to the relief of only a small part of the destitute public? Can any one institution administer to the wants of all? * * * Who would say that a home for aged men was a private charity, or a home for poor and aged women was not a public charity?" If the court had read its own opinion in City of Newport v. Masonic Temple Ass'n, 108 Ky. 333, 20 Ky. Law Rep. 1785, 56 S. W. 405, 49 L. R. A. 252, it would have found a full answer to all of this.

The court says: "The convention meant by the word 'purely' to describe the quality of the charity, rather than the means by which it is administered; that it should be wholly altruistic in the end to be attained; and that no private or selfish interest should be fostered under the guise of charity." To say this is to strike from the constitutional provision the word "public" and substitute the word "pure" for the word "purely," so as to make it read "institutions of pure charity," instead of "institutions of purely public charity," as written. Every one knows there are "purely private charities" and "purely public charities." Only the latter by our Constitution are exempted from public taxation. If the court

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may strike out the word "public," why not strike out also the word "charity," or any other word that may not in future meet the approval of the court as then constituted? The only value of a written Constitution is in its being taken according to its terms. The South American Republics have Constitutions as good as ours, but they amount to nothing, because they are construed by each faction according to its sentiments, rather than the plain ordinary meaning of the words used. I have no quarrel with much of the fine sentiment of the opinion, but good rhetoric may not be good law. This court is not a constitutional convention, and the question is not what the law ought to be, but what it is according to the terms in which the Constitution is expressed. Certain it is that from the fundation of the State, to the adoption of the Constitution, the law had been as laid down now by the court. The words of the law were familiar, and had often been construed by the court. Under the old law institutions of charity purely, whether private or public, were exempt. The old phraseology was abandoned, and new words used confining exemptions to institutions of "purely public charity." See Orphans' Home v. Bosworth, 112 Ky. 200, 65 S. W. 591, 23 Ky. Law Rep. 1505. When only institutions of purely public charity were exempted, would not a person of ordinary understanding conclude that institutions of private charity were not exempted? If appellant is not a purely private charity, where in the State will one be found?

"While there are decisions to the contrary, the preponderance of authority is in favor of the doctrine that an exemption of benevolent and charitable institutions does not extend to a society which confines its benefits to members or their families." 12

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Am. & Eng. Ency. 343, and see cases cited in note. The decisions referred to holding to the contrary are from states where the words "purely public" are not used in the law defining the exemptions. The phrase "purely public charity" is a common one in American statutes and Constitutions, but the court is without precedent in any of these states for overruling a former opinion and construing away the plain terms of the Constitution. While only the case of Orphans' Home v. Bosworth, 112 Ky. 200, 65 S. W. 591, 23 Ky. Law Rep. 1505, is expressly overruled, the case of City of Newport v. Masonic Temple is in effect overruled by the opinion, for the two cannot stand together, as the reasoning of the one is precisely opposite to the reasoning of the other.

I therefore dissent from the opinion of the court.

NUNN, J., concurring.

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CASE 46.—ACTION BY HARRY SPINKS AGAINST THE UNITED STATES LIFE INS. CO. OF N. Y. ON A POLICY OF LIFE INSURANCE ON THE LIFE OF HIS FATHER.—October 19, 1906.

United States Life Ins. Co. v. Spinks

Appeal from Campbell Circuit Court.

JOHN T. HODGE AND A. S. BERRY, Successive Judges.

Judgment for plaintiff. Defendant appeals.—Affirmed.

1. Insurance—Mutual Insurance Companies—Surplus—Lapsed Policy.—The "surplus" of a mutual life insurance company belongs equitably to the policy holders who contributed to it in the proportion in which they contributed to it. Under Sec. 88, c. 690, p. 1869, Laws 1892, of New York, the share of a policy lapsed for nonpayment of premium (after having been in force three years) must be applied to the purchase of extended insurance unless the policy holder has elected to take paid-up insurance therefor.
2. Same—Extended Insurance.—The words "dividend additions" as used in the New York statute refer to that part of the premiums charged which was "loaded" on to the premium in excess of its share of expenses and losses sustained. Such additions, and the earnings thereon, which constitute the "surplus," must be valued and applied in buying extended insurance for lapsed policies in force three years or longer, in the same way that the "reserve" of the policy is required to be valued and applied in purchasing such extended insurance.
3. Same—Valuing Surplus.—Insurance companies must keep accurate accounts with their policy holders as classes, failing which, no presumption will be indulged in the companies' favor when it comes to valuing and applying "surplus" or "dividend additions" to lapsing policies.
4. Same—Dividends.—It is not optional with the directorate of

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life insurance companies not purely stock companies, whether they will declare dividends, or to what extent, of the so-called surplus.

(Syllabus by the court.)

On rehearing June 26, 1907.

5. Insurance—Liability of Insurer—Life Insurance—Extended Insurance—Dividend Additions.—Laws of New York 1892, p. 1969, c. 690, Sec. 88, requiring the application of the reserve, on a policy lapsed after being in force three full years, to the payment for extended insurance, and providing that "reserve" should include "dividend additions," meant that the surplus on a lapsed policy, as well as the reserve thereon, should be applied in purchasing extended insurance in case of lapse after a policy was in force three years, though the words "dividend additions" may have meant in a technical sense, in life insurance, additions on account of surplus to the face of a policy, payable at death while the insurance was in force.

A. E. WILLSON and W. H. MACKOY for appellant.

QUESTIONS DISCUSSED AND AUTHORITIES CITED.

1. That the contract evidenced by the policy of insurance was legal and one which the appellant was competent to enter into and had the authority to make: Charter of Appellant and Amendments thereto; Sec. 88 of c. 690 of New York Laws of 1892; N. Y. Life Ins. Co. v. Miller, 22 Ky. Law Rep., 230, 232.

2. The word "dividend," or "dividends," where it occurs in Sec. 88, Chap. 690, of the New York Laws of 1892, must be given the same construction as the word "dividend" in Condition VII. of the policy of insurance under consideration. The word "dividend" has a fixed and settled meaning: Thompson on Corp., vol. 2, sec. 2126; Greef v. Equitabe Life Ass. So., 160 N. Y., 19; Cook on Stock and Stockholders, sec. 542, Note 5, secs. 272, 545; Bouvier's Dict., vol. 1; Goodwin v. Hardy, 57 Me., 143, 145; Hyatt v. Allen, 56 N. Y., 553, 557; Brown v. Collins, Ky. Law Rep., 12 Eq. Cas., 594; Lowry v. Farmers L. & T. Co., 172 N. Y., 137, 144; Lockhart v. Van Alstyne, 31 Mich., 76; Williston v. Mich., etc., R. Co., 13 Allen (Mass.), 76.

3. The declaration of a dividend, in the absence of fraud or abuse of discretion, rests with the Board of Directors of a life insurance company as in the case of other corporations, and a policy holder in an insurance company is not entitled to a divi-

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dend until one is declared: N. Y. Life Ins. Co. v. Miller, 22 Ky. Law Rep., 230, 232; Mut. Life. Ins. Co. of N. Y. v. Girard Life Ins., Ann. & Trust Co., Admr., 100 Pa. St., 172, 179, 180; Moss' Appeal, 83 Pa. St., 264, 269; Lowry v. Farmers' Loan & Trust Co., 172 N. Y., 137, 144; Joyce on Ins., vol. 2, sec. 1166; N. Y., L. & S. W. R. R. Co. v. Nickals, 119, U. S., 296; Beveridge v. N. Y., E. R. Co., 112 N. Y,, 1.

4. There is no question in the case at bar of doubtful construction or repugnancy between Sec. 88 of the New York Law and Condition VII of the policy, and no room for the application of the rule that, in case of repugnancy, the construction must be favorable to the assured: Joyce on Ins., vol. 1, secs. 205, 212, 216, 21, 219, 222.

5. The relation between the appellant and the appellee and the insured is one of contract, and not of trustee and cestui que trust: Everson v. Eq. Life Ass. So., 68 Fed. Rep., 218; Uhlman v. N. Y. Life Ins. Co., 109 N. Y., 421; Bewley v. Eq. Life Ass. So., 61 How. Pr., 346.

(First) The word "mutual" must be construed in connection with the entire charter of the appellant and the amendments thereto, and especially in connection with the amendment which was passed March 31, 1882.

(Second) Sec. 88 of the New York Law is a part of the policy and must be construed in connection with Condition VII of the policy.

(Third) The contract of insurance evidenced by the policy in question, did not require the appellant to keep a separate account of the receipts, disbursements or investments from policies of the Spinks class, or of any class. No such claim is asserted by appellee in his pleadings in this case: Bogardus v. N. Y. Life Ins. Co., 101 N. Y., 328, 335, 336, 337; Uhlman v. N. Y. Life Ins. Co., 109 N. Y., 421.

JOHN G. CARLISLE, C. E. PATTERSON, WM. A. ELLIOTT, W. H. MACKOY, AUGUSTUS E. WILLSON and MARSHALL BULLITT for appellant.

POINTS AND AUTHORITIES ON PETITION FOR REHEARING.

1. "Dividend additions' is a technical term, meaning the rate by a dividend previously declared out of surplus.

2. As the Spinks policy was a ten-year continuable term policy there could not under any circumstances be any "dividend additions thereto.

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3. This court made both a mathematical and commercial error in assuming that because on those policies which were kept for ten years up until the end of the accumulation period the rate of dividend was 8 per cent. of the total premiums paid, it would follow that a similar rate of dividend was or could be earned on the total premiums paid for only three years.

4. Under Ky Stats., Sec. 656, as construed by this court in many cases, no alleged provision of a contract of insurance can be enforced unless contained in or attached to the policies sued on. In the case at bar the provision as to "dividend additions" is not contained in or attached to the policy and therefore cannot be considered for any purpose whatever.

(First) The New York statute only applies to business done in New York, and does not have any extra-territorial effect and cannot affect a contract made in Kentucky: Washington Life Ins. Co. v. Glover, 25 Ky. Law Rep., 1327.

(Second) The New York statute was not printed on the Spinks policy, and therefore cannot be relied on as a part thereof: In Provident Savings v. Puryear, 109 Ky., 381; Provident Savings v. Beyer, 23 Ky. Law Rep., 2460; Supreme Commandery v. Hughes, 114 Ky., 175; Mooney v. Ancient Order of United Workmen, 114 Ky., 950, 959 (1903); Hunziker v. Knights of Pythias, 117 Ky., 418; Letzler v. Pacific Mutual, 25 Ky. Law Rep., 372 (1905); Rice v. Rice, 23 Ky. Law Rep., 635 (1901).

L. J. CRAWFORD for appellee.

PROPOSITIONS ADVANCED AND AUTHORITIES CITED.

1. Appellant is a mutual company and cannot deny dividends to its policy-holders.

2. Sec. 7 applies only in event insured lives to end of term.

3. The New York law applies in case of death before end of term.

4. New York law is a check upon domestic companies, and means more than that the company shall include in reserve only such dividends as have been already credited to the policy. Otherwise it would have no effect.

5. The dividends were sufficient, treating policy as participating policy.

6. Keeping no account with any class entitles appellee to general yearly dividends.

7. The general dividends are sufficient.

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8. Even if contract is equivocal, all doubts will be resolved in favor of the insured.

9. Legislative checks upon tontine insurance: Vol. 26, 1st Ed., American and English Encyclopedia of Law, pp. 52, 53, 54, 61, 62.

Note—The New York Law, Charter and all material amendments are in the amended petition.

J. H. HAZELRIGG and L. J. CRAWFORD for appellee.

PROPOSITIONS ADVANCED AND AUTHORITIES ON PETITION FOR REHEARING.

1. The term "dividend additions" is a general term and means additions made to anything for or by reason of dividends.

2. New York law applies to "any policy" in providing for "dividend additions," and if these words mean only "paid-up additions" to the amount of insurance named in the policy, then policyholders who are not entitled to "paid-up additions" would be deprived of "dividend additions."

3. Dawson in his "Elements of Life Insurance" uses the term "dividend additions" several times in a special sense, descriptive of "paid-up additions," but uses many other expressions as descriptive of "paid-up additions." See pp. 98, 99, 105, 109, 116 and 144.

4. In 1875 the technical term for "paid-up additions" was the "reversionary value of the surplus." See Notes on Life Insurance, by Gustavus W. Smith, pp. 112, 113 (1875 ed).

5. The recent literature relied on in petition for rehearing is reviewed and the general and special uses of the term "dividend additions" and the various other expressions used in lieu of "paid-up additions" are pointed out.

6. The "Recommendations for Uniform Legislation," etc., and the New York Statute of 1906, by excepting term policies from the benefit of the New York statute of 1892, merely emphasize the fact that such benefits extended to term policis.

7. The loading of premium for dividend purposes exceeded 6 per cent of each premium.

8. The New York law is part of the contract and nothing in cases cited by appellant will preclude the court from so considering it. Such cases refer merely to applications, by-laws, etc., which companies attempted to rely upon, contrary to Sec. 679, Ky. Stats., or are not applicable for other reasons pointed out.

9. Sec. 679, Ky. Stats., was passed for the protection of policy-

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holders, and a company can not, by relying on it, take advantage of its own wrong.

10. Same as to Sec. 656, Ky. Stats., which makes it a criminal offense for a company not to plainly express the contract in the policy.

11. Appellant is a mutual company and appellee's policy is a participating policy.

(a) See Art. 3 original charter of appellant.

(b) See waiver of mutual feature.

(c) No repeal of mutual principle.

12. References to "Dawson's Business of Life Insurance," ed. of 1906, pp. 3, 46, 51, 109, 110, 120, 164, 240.

13. References to proposed laws in the "Recommendation." See pp. 63, 66,, 82.

14. If contract doubtful, court will resolve doubt in favor of insured.

15. The company's charter directs a distribution of net profits. See subsec. 5 art. 6 (p. 22 printed record), and subsequent clauses of this article.

16. The reserve properly calculated runs from February 21, 1898, and without regard to "dividend additions," insured Spinks to a time thirty-eight days beyond his death.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR.—Affirming.

February 21, 1894, appellant issued to Charles Spinks a policy of insurance upon his life, payable to his son, Harry Spinks, appellee. The policy was an agreement to pay the beneficiary the sum of $25,000 if the assured died within 10 years from December 12, 1893. The consideration was the payment of $1,128.25 annually by the assured on or before December 15th of each year, as premium, the first payment having been contemporaneous with the issue of the policy. Among the conditions contained in the policy was this clause: "(2) After being in force three full years, an extended insurance shall be allowed, in accordance with the requirements of chapter 690, p. 1930, of the Laws of 1892, of New York." The insured

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paid appellant four annual premiums of $1,128.25 each, aggregating $4,513, which continued the policy in force regardless of chapter 690, p. 1969, section 88, Laws of New York, up until December 12, 1897. The insured did not pay the premium due on December 12, 1897.

Section 88, c. 690, p. 1969, Laws of New York 1892, is as follows: "Whenever any policy of life insurance issued after January 1st, 1880, by any domestic life insurance corporation, after being in force three full years, shall by its terms lapse or become forfeited for the non-payment of any premium or any note given for a premium or loan made in cash on such policy or security, or of any interest on such note or loan, the reserve on such policy computed according to the American Experience Table of Mortality at the rate of four and one-half per cent. per annum shall, on demand made, with surrender of the policy within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount, so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of lapse or forfeiture, or to purchase upon the same life at the same age paid-up insurance, payable at the same time and under the same conditions, except as to payment of premiums as the original policy. If no such agreement be expressed in the application or policy, such single premium may be applied in either of the modes above specified at the option of the owner of the policy, notice of such option to be contained in the demand hereinbefore required

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to be made to prevent the forfeiture of the policy. The reserve hereinbefore specified shall include dividend additions calculated at the date of the failure to make any of the payments above described according to the American Experience Table of Mortality with interest at the rate of four and one-half per cent. per annum, after deducting any indebtedness of the insured, on account of any annual or semi-annual or quarterly premium then due, and any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing. The net value of the insurance given for such single premium under this section, computed by the standard of this State, shall in no case be less than two-thirds of the entire reserve, computed according to the rule prescribed in this section after deducting the indebtedness as specified, but such insurance shall not participate in the profits of the corporation. If the reserve upon any endowment policy, applied according to the provisions of this section as a single premium of temporary insurance be more than sufficient to continue the insurance to the end of the endowment term named in the policy, and if the insured survive that term, the excess shall be paid in cash at the end of such term, on the conditions on which the original policy was issued. This section will not apply in any case where the provisions of the section are specifically waived in the application, and notice of such waiver is written or printed in red ink on the margin of the face of the policy when issued." As the provisions of this act were not specifically waived in the application or otherwise, or notice of such waiver indorsed in red ink on the policy, the last section of the act above quoted is not applied, and the act is to be treated as if that section had been omitted.

On January 27, 1898, the assured, Charles Spinks,

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and the beneficiary, Harry Spinks, appellee herein, requested the appellant in writing to apply the entire reserve on the policy, including dividend additions, if any, therein calculated as provided in the policy, to be taken as a single premium to continue the insurance of $25,000 named in the policy in force at its full amount for such time as said single premium would purchase that amount as non-participating insurance at the company's rates therefor at the date of the policy, taken at the age of the assured at date of default, subject to the conditions and agreements of the contract contained and referred to in the policy. The written application was transmitted with the policy to appellant, who on February 14, 1898, issued and delivered to Charles Spinks its certificate of extended insurance which was in these words: "The United States Life Insurance Company in the City of New York, doth hereby certify, that in pursuance of the application therefor, of which the above is a copy, the principal sum of insurance mentioned in the hereto annexed policy No. 79,714, on the life of Charles Spinks, and (if all the terms and conditions of said policy, in it contained and referred to, have been and shall be fully kept, and not violated), payable in the manner therein mentioned to the persons therein described as the payee thereof, viz., $25,000.00, will be so payable as continued insurance, in the event of the death of the insured life on or before the 10th day of August, in the year eighteen hundred and ninety-eight; but after said date said policy, and the continued insurance thereunder, will in all respects be and become determined and null, void, and of no effect. The continuation of the insurance as aforesaid being in accordance with the conditions and agreements in said policy mentioned, and the application for said

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continued insurance, of which the above is a copy, as aforesaid, and which application is hereby made a part hereof. Dated, New York City, February 14th, 1898." The assured, Charles Spinks, died September 13, 1908. No other action was taken before his death either by him or the insurer relative to any other extension of the policy.

Thereafter this suit was brought by appellee as the named beneficiary to recover from appellant the full amount of the insurance. In addition to the foregoing facts, it was alleged in the petition that there was a considerable sum in the hands of appellant (hereinafter sometimes referred to as the "Company") known as surplus, belonging to, and contributed by, the policy holders, of whom Charles Spinks was one of a class, and which was subject to dividends on behalf of such policy holders; that of such surplus there was enough due to be applied to the policy in suit on February 14, 1898, and, on the date of the default in the payment of premium by the assured, which, if applied as a single premium at the company's published rates at the date of the policy, would have purchased for the assured extended insurance for the full amount of the policy for a period beyond September 13, 1898; that the company fraudulently, or by mistake, failed to include such dividend in the reserve of the policy when it extended the insurance, although assured had applied for it to do so, and never knew but what it had done so. It was also charged that appellant was wholly a mutual company. The company denied that there was any dividend addition which could have been applied to the extension of the policy; denied that it had ever declared any dividend to this policy; and denied that there was any fund out of which it could have legally declared such dividend. It

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also pleaded that the policy was a deferred dividend term policy of life insurance, containing among other things these express conditions: "(1) All premiums are payable in New York City at the company's office. * * * Failure to make payment of any subsequent premium either to the company or to a duly authorized agent, in exchange for receipt signed as above * * * will render this contract null and void. Whenever this policy shall become null and void for any cause, all payments made hereunder shall become forfeited to the company, except that: (2) After being in force three full years, an extended insurance shall be allowed, in accordance with the requirements of chapter 690, of the Laws of 1892, New York. * * * (7) The said company agrees, in case the life insured survive to the end of the specified period, if this policy be then in full force, to pay to the legal holder or holder of this policy the dividend apportioned to this policy from its profits by said company." Appellant pleaded that clause 7, just quoted, excluded the Spinks policy from participation in any division of profits or surplus, unless the assured survived the period for which he was insured, and unless the policy was then in full force; that, as he died, and was also in default of premiums, within the 10 years, the policy was not in full force at the expiration of the term, and was not therefore entitled to participate in any distribution of the surplus or profits among appellant's policy holders. It denied that it was a mutual company, and denied that it had, through fraud or mistake, failed to credit to, or include in, the reserve of said policy any dividends from the surplus and profits, though it admitted that it had not done so, but claimed that it so failed because the policy was not then, and never was, entitled to share in such profits or surplus or any

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dividend thereof declared. On motion of appellant this action was transferred to equity, and was tried on its merits by the chancellor, who found that the policy sued on was entitled to share in the surplus, and that its share, computed according to the provisions of the policy and the laws of New York, was sufficient to have extended it beyond the date of the death of the assured. It was consequently decreed that the beneficiary recover the full sum insured from the company with interest from the filing of the suit. The company has appealed.

The questions for decision are two: First, What is the meaning of the term "dividend additions," as used in the New York statute which is quoted ante? Second, Was there due to be applied to this policy at the date of the default in premiums, a sum sufficient of such dividend additions, when added to the value of its reserve, to have paid for an extension of the insurance to and including September 13, 1898?

Appellant contends that the word "dividend" has a well-defined legal meaning, which is in accord with its popular use; that it signifies such portion of accumulated net earnings, or surplus, as the directorate of a corporation may deem expedient to be distributed, and in appropriate proceedings is by them ordered to be distributed among those entitled by law to receive it; that a dividend is ex vi termini the part of a thing which has been set apart for distribution. Counsel for appellant therefore argue that as there was not official action in declaring or setting apart a dividend, none could be added to the reserve of the policy; that the matter of declaring dividends from the company's surplus, or net profits, was one committed properly and necessarily to the sound business sense and discretion of the directors, to be exercised by them in

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behalf of the company and its patrons as their best interests appeared to the directors to justify. That this is the rule commonly applied to corporate dividends cannot be denied. And if the word dividend is used in the New York statute in the sense and to express the same idea as when used ordinarily regarding the distribution of the surplus earnings of other corporations, it seems to us that appellant's attitude is unassailable. Whether the word is so used involves a careful study and an understanding of certain terms commonly employed in the business of insurance, and which are found in the statute and policy before us, to the end that we may see whether, in expressing the mind of the legislator or contractor, the language employed has a peculiar, or only the common, significance, for it is well known that words of common use, and having a generally accepted single meaning, when so used, may have an entirely different meaning by the usage of a particular trade, cult, or business. And, as the use of all words is to express the idea intended to be understood, the meaning which the user of the words had in mind is the one to be applied in interpreting his written or spoken language. To understand him, we will have to put ourselves in his place, to view the subject from his point of view, and to give to his words the same meaning which he understood and intended them to have. If, therefore, the words to be interpreted had a peculiar meaning when used in reference to life insurance, the legislature and the contracting parties in this business evidently employed them in that sense. We must see whether they had such meaning.

Life insurance is not a modern business invention, although modernly many new features have been added to it, which may seem to be foreign to its origi-

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nal conception. But the main principle upon which it rests has not been changed. The plan is to collect from a class of selected persons, chosen with reference to their ages, health, occupations, and so forth, such a fixed sum as will, when kept safely invested at interest, pay to the estate of each of them when he dies, a certain sum of money, which was originally taken as the basis of the collections. It has been found, and it is a fact, that this can be done. The percentage of mortality of such persons is ascertainable in advance. From a long series of observations it is known to a reasonable certainty how many of the number will die within a given time. Thus the life tables, or tables of mortality, have been made up. The one in most common, if not universal, use in this country, is the American Experience. From these it is shown that of a given number of such persons of the same age and condition, each contributes a certain sum, either in one lump sum in advance, or in annual installments, that such contribution when loaned or invested at current interest compounded will so increase that as each one of the contributing class dies there will be enough in the common fund to pay to his estate a principal sum previously taken as the basis of the charges which he has contributed. The sum which he is required to pay is called the premium. If 1,000 men, aged 20, enter into an agreement to pay each one as he dies $1, and to provide in advance a fund therefor, which will be sufficient, and no more than sufficient, to meet the undertaking, they find that from the tables of mortality so many will die the first year, so many the second year, and so on, so that enough will have to be paid in advance that out of it there can be paid the death claims of the per cent. who will die each year, and leave enough which, placed at

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compound interest, will accumulate a fund sufficient to pay all the others as they die the agreed sum of $1. Obviously, the first important step in formulating the scheme is to determine that amount of money which will, when increased by interest at a given rate per annum, compounded annually, become $1 in a given number of years—the expectancy of the duration of life of the whole class. This amount will constitute the premium. The rate of interest must of course be not greater than current rates, and should be slightly less. Insurance companies generally adopt 4 per cent. or 4½ per cent. as the basis of such calculations. It will of course require more money at 4 per cent. interest to produce $1 at a given future date than at 4½ per cent. interest. Therefore the greater the interest rate adopted the smaller the premium charged. Thus we find that $0.95693-|- will at 4½ per cent interest become $1 in one year. For two years there would have to be such sum as would being put at interest at 4½ per cent. for two years produce $1, which would be a less sum than required to produce $1 in one year, and for three years a still less sum, viz., $0.87629-|-. The longer the principal sum could be at interest the less it would have to be to start with to produce $1. So when we have the table of mortality showing the average life or expectancy of the class to be insured, it can be worked out to a mathematical certainty just what sum is required to be paid by each to be loaned at 4½ per cent. interest compounded annually in order to pay them all $1 each as they died. Only a certain per cent. of 1,000 insured will die the first year, hence the whole sum that would be required to be put at interest to pay them all the full amount will not be called for. The life tables will show how many will probably die. The fraction produced by the mortality

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number divided by the number of insured, when multiplied by the sum to be put at interest at 4½ per cent. for one year to produce $1, will then represent what each will have to pay in advance in order to have in the common fund enough to pay the death claims maturing that year. This effects the insurance for one year only. Only those dying get anything. The survivors get nothing. They have been insured—have been protected against the chance of being included in the number who died. This would be called the net cost of insuring $1 for one year. The cost of insuring $1 for a whole life is made up by adding together the net cost of each year beginning with the age of the insured when the insurance is effected, and continuing to the end of his expectancy, which would be the net single premium for whole life. But, as life insurance premiums are generally paid annually, or annually for a limited number of years, instead of one premium for the whole life, the sum to be paid each year as an annual premium is arrived at by a mathematical process not necessary to set forth here, but which is, nevertheless, certain, and the one adopted by all life companies. This annual net premium is divided into two parts: One, to help pay death claims occurring that year, being the proportion that policy is required to contribute to pay death claims arising that year in its class, and the other is placed by the insurer at interest to the credit of a fund which shall at all times be kept equal to the net single premium that will at the age the policy holder has attained be sufficient to then effect his insurance. The fund is sometimes called by one name or another, but is now commonly known as the "reserve," and is regarded by every well-informed authority "the great sheet anchor of life insurance." It will thus be seen

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that the policy holders effect and pay their own insurance. They insure themselves and each other. It is essentially mutual. No company ever has to any great extent, and in the nature of the business cannot, do a life insurance business on any other basis than that of making the insured lives carry their own insurance. No stock company is rich enough to carry upon its capital alone the weight of liability represented by the policy liabilities of any of the great modern life insurance companies.

But we have traced the business only so far as to show the net cost of insurance, and how it is provided. There are of course expenses to be met in the conduct of the business. Managerial, rents, taxes, advertising, and agencies. These, too, must be borne by the benefited class, the policy holders. So enough must be added to the net premium charged to cover these expenses. There is also added something to cover such contingencies as that the death rate in any year from some abnormal cause, such as a great epidemic, shall increase beyond the average expectancy, and for the loss in value of investments caused by financial panics, or by dishonesty of officials. The sum added to the net premium to meet these expenses and contingencies is called "loading" the premium. As such expenses and losses cannot certainly be known in advance, an approximation is made, and the total sum collected is called the gross premium. That is the premium actually charged and collected from the insured. It is applied, or ought to be, first, to pay that policy's proportion of that year's death claims; then to make good its own reserve; then to pay the expenses, including all official salaries; then to pay losses, if any. If there should be a balance after paying those items, it is called a "surplus," which is a

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pretty good name for it. The aggregate of all the excessive collections of premiums in that year constitute that year's accumulation of "surplus." This fund is sometimes called, or miscalled, "undivided profits," or "surplus earnings," or the like. But it represents only the aggregate of overcharges of premiums assessed against the policy holders. The greater it is, the greater the unnecessary exaction that has been made by the insurance company from its policy holders in carrying on the business of collecting from them a sufficient sum to pay all of them the sums agreed at their deaths, and in the meantime to pay all the legitimate and necessary expenses of maintenance. If the insurance company doing the business were only a stock company, in the absence of statutory regulation, all "surplus" or "profits" would belong to the stockholders. It would represent that much more charged for doing the business than it cost, and would be properly profit. But where the company is a mutual, being conducted on the plan of giving the cheapest safe insurance to its members, all surplus ought to belong to the members, the policy holders. For in a purely mutual company there are no stockholders, and no one else therefore to whom the surplus could go than its policy holders. And it should in equity go to those who had contributed it. The officers of such a corporation being paid salaries for their services have no interest as such in the surplus. In mixed companies—that is, partly stock and partly mutual—the act creating them usually designates the maximum per cent. that shall be paid in dividends to the stock, the residue of "surplus" or "net earnings" going to the contributing policy holders.

We find from this record that appellant belongs to the latter class. The maximum dividends to its stock-

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holders were all paid, and were deducted from the gross earnings. The "surplus" was what was left after paying the dividends to stockholders, all expenses and all losses, and after providing for all death claims and for maintaining the reserves. Hence this "surplus" should be treated as if the company were purely a mutual company. Not only ought the surplus to be divided among the policy holders contributing it, as a matter of equity, but an amendment to appellant's charter provides for limiting the amount of capital stock, and the rate of "interest" it shall receive, and excludes the capital from receiving any other rate of interest or any share in the "net profits, surplus or dividends of the company." The act continues: "But thereafter the entire net profits and divisible surplus shall be ascertained by the board of directors in accordance with the contracts between the said company and its policy holders respectively; and annually, or once in two or more years thereafter, the sums which may be set apart by the said board from such net profits or divisible surplus for such purposes shall, in the manner provided in said charter, as hereby amended, be apportioned among the policy holders entitled to participate therein according to their respective classes and the terms of their respective contracts." Act March 31, 1882, Laws New York, 1882, p. 36, c. 44. It is upon this amendment that the company rests its contention that, under clause 7 of the policy, ante, it and Charles Spinks agreed that this policy was not to share in any distribution of profits until and unless he survived the term of 10 years; and that all the surplus of that class should be distributed to those of the class who did survive and persist in their membership. Appellant claims that this constituted the policy a tontine. The

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original tontine contemplated that the total fund should go to the survivors of a class, regardless of the cause of their dropping out. When applied to insurance it seems to have an opposite effect from the real matter of insurance, the latter being to pay you if you die, the former to pay you if you do not. Tontine insurance, therefore, was an agreement to divide the "surplus" which all of that class had contributed, among those who outlived the term agreed upon, and who persisted as paying members. It is a species of hazard, in which the strong and the rich have the greater chance of winning, although they pay no more for it. The poor, the weak, and the unfortunate are almost sure to lose. The system gathers together enormous sums, not always properly handled or invested, which are placed for a long term in the sole custody of agents for investment and speculation, and whatever remains after the term has expired goes to those in the main whom the circumstances have proven needed it the least. The plan has met with much criticism, and it is forbidden altogether by the laws of some states. This suggests one, and brings us to consider the other, abuses that led to the enactment of section 88 of chapter 690, page 869 of the Laws of 1892 of New York.

From what has been said, it will be noted that each policy holder of life insurance contributes his own policy reserve. When, for any reason, he dropped his insurance, or failed to pay an annual or other installment when due, formerly the company forfeited his contract, and appropriated all he had paid. This was tolerated a long time upon the popular supposition that each year's premium paid for that year's insurance only. It was not generally known that a large part of it went to the creation of a reserve fund

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to carry that identical insurance to maturity. In this way enormous sums were confiscated by insurance companies, to which they had no equitable right, and in mutual companies to which they had no right at all. This led to widespread and wholesale corruption in the management of insurance companies. Exposure of the methods occurred first about 1860. Not a great while afterward, and as the direct result of the exposures, Massachusetts adopted the now famous non-forfeiture law, which was aimed to prevent the forfeiture of a life policy after it had accumulated a reserve, but required the application of the reserve to the purchase of extended or paid-up insurance for the assured to the extent that the value of the reserve would buy such insurance at the single rate, that is, one-payment rate of the insuring company. This statute, so eminently just and wise, is now very generally adopted in the United States, and the same idea has been adopted by nearly all, if not all, insurance companies now by reason of the competition they would be otherwise unable to meet from companies where the statute is in force. Massachusetts, and perhaps other states, have adopted also an "annual dividend" statute, requiring the yearly distribution of the "surplus" among policy holders contributing it. This legislation is of a kind with the other. But it goes further. It prevents a species of extortion upon the policy holders becoming effective for great evil. Undoubtedly, the accumulation of vast sums of money in one center, improperly gotten together and unfairly held, is a sore temptation to men, if unscrupulous and adventurous, to embark it in purely speculative ventures, in which they would directly or indirectly derive great profit to the detriment of the owners of the fund. Its tendency would be to encourage dis-

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honesty, and the unnatural disturbance of business and of market fluctuations thus illegitimately brought about. So it is a wise exercise of the police power of government that tends to prevent such abuses.

It is too well settled now to need citation of authority that life insurance is a business that the State may regulate under its police power, exercised for the public good. The statute being considered is of that species. Its first aim was to prevent a confiscation of the policy holder's property to the benefit of another. It was recognized that unforeseen casualty, unexpected and sudden poverty, sickness, sudden mental derangement, unavoidable absence, forgetfulness, or other cause, might intervene to cause a policy holder to fail to pay his premium the day it was due. Forfeitures are abhorrent to the law. The State intended by this staute to prevent just such forfeitures. It forbids them. But, as the insured had paid in his money for insurance, it was recognized that it would be unjust to make the company give him anything for his money but insurance. So the plan was evolved to convert his funds in the hands of the company into money, and then apply that money to buy extended or paid-up insurance of the kind shown in the original contract. The company is no more entitled to confiscate or forfeit the policy holder's "surplus" than his "reserve." Such forfeitures would have benefited the same persons precisely, and have injured the owner in the same way and from the same cause. Having determined to prevent forfeitures, the next step for the legislature was to provide a plan by which the value of the defaulted policy might be justly and correctly ascertained. Obviously, the surest way was to follow the same line as the company had in calculating the premiums, which was, as

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the legislature doubtless determined, on the 4½ per cent. interest basis, and the American Experience Table of Mortality. In that way, any actuary could easily compute the minimum value of the reserve with certainty. This value of the reserve was then, by the statute, required to be applied in the purchase for that policy of an extended insurance, unless the policy holder elected to take paid-up insurance. But the legislature saw that it was saving to the policy holder only a part of his money, in so converting and saving his "reserve;" that he would for the same unfortunate cause which had been deemed by the legislature sufficient to enlist its exercise of the State's police power on his behalf, with respect to his reserve, lose still another part of his money, which was collected from him precisely as the reserve was, viz., his contributions to "surplus." To complete the equitable purpose the legislature then declared "the reserve fund hereinbefore specified shall include dividend additions." If the section had ended there what was meant by the phrase "dividend additions" might have been more obscure than it now is. It is difficult to apply the word "additions" to a dividend which had been declared in the usual course of a corporation out of its net earnings or surplus. The word "additions" has a particular meaning as used. We have seen that there are additions to the net premium in life insurance for various purposes, the surplus of which is to be paid back to the contributors by the way of dividends. So "dividend additions" means the additions which the company made to the net premium in "loading" it, out of which dividends were to be distributed to the policy holders. The section does not end with the expression just quoted. It continues by directing how such "dividend additions" are to be

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valued, which is seen to be in the same way that the reserve is. This is certainly right and understandable. The sum of the "dividend additions," or distributable surplus, has been contributed by all the policy holders in the same proportion that they paid their premiums. For example, a man aged 40 pays a higher rate of premium than a man aged 20, both having the same kind of policies. It is also true that a man aged 40 pays a different rate of premium on an insurance for life than a man the same age would pay on a 10-year payment plan. Recognizing that the surplus belongs to those who contributed it, and in the same proportion that they contributed it, the statute points out that the value of each man's equitable share of it must be ascertained by reference to the plan upon which his whole premium was based. For it was known that after the net premium was ascertained, based on the American Experience Table of Mortality, and interest at 4½ per cent., it was loaded in the same proportion; that is, 33 1-3 per cent, or 30 per cent, or whatever may have been added, was added calculated upon the level of the net premium. So, if the loading was 33 1-3 per cent, a man aged 20, whose net premium was $24 for $1,000 of insurance, would be charged as premium $32, while a man aged 40, whose net premium was $30 on $1,000 of insurance, would pay $40 as premium. One would have contributed $8, while the other contributed $10, toward expenses, etc., on policies for the same amount and class. Yet each contributed on the same basis, the same general plan of calculation. So that whatever was left as surplus would have to be redistributed upon the same plan that it was originally collected to get at the equitable sum due to each. This construction satisfies and employs every word

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of the statute, and gives a meaning to each sentence and phrase.

As opposed to this construction, we quote appellant's contention: "What section 88 means is that, where a life insurance company has declared dividends prior to the lapsing of a policy, which dividends had been credited to the holder of the policy at the time of the lapsing of the policy but were not payable, the value of such dividends should be ascertained as provided in section 88, and then should be added to the reserve in determining the amount of the single premium to be applied to the purchase of extended insurance." This contention is unsound. It would allow the company to defeat all dividends by never declaring them, and particularly by not declaring any during the term of the policy. Thus would the construction defeat the statute. It does not attempt to account for the use of the phrase "calculated at the date of the failure to make any of the payments above described according to the American Experience Table of Mortality, with interest at the rate of 4½ per cent per annum," etc. It eliminates that phrase by leaving it meaningless. If the dividend had already been declared, its value was then already ascertained and was worth just as many dollars as its face. It would be unnecessary then to calculate the value of dividends already declared in money as earned and actually apportioned. Nor do we see how such a calculation of value could be based upon an experience table of mortality and interest at 4½ per cent. Nor could the sentence quoted above from the statute have referred to the manner of applying the value of the dividend additions, for the manner of application is elsewhere specifically directed, viz., at the company's published single premium rate in exist-

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ence when the policy was issued. Furthermore, the following clause in the statute shows that the surplus was intended to be disposed of by that proceeding without a dividend thereon having been declared by the directors. It provides that the insurance so purchased (by applying the value of the "reserves" and "dividend additions" belonging to the policy) "shall not participate in the profits of the corporation." Manifestly, if appellant's contention were the correct one, if the "reserve" of the Spinks policy had been enough to carry it to the end of the 10-year period, and he had then survived, he would have been entitled to such share in the "profits" he had contributed to, because his share had not otherwise in that event been appropriated by him nor forfeited.

We construe the term "dividend additions," as contained in this statute, to mean that portion of the surplus in the hands of the company, accumulated from the premiums and profits paid upon and made upon the class to which the policy in question belonged; that a defaulting policy holder's share of "dividend additions" was to be ascertained as of the date of the failure to make any payment of premiums on the basis of the American Experience Table of Mortality with interest at 4½ per cent. per annum. In other words, on the same plan that his policy had contributed to the creation of said surplus. We have been left without precedent to guide us in this construction—for the statute does not seem to have been construed by the court of appeals, or even by the supreme court of New York. Nor are we cited to any construction of this or any similar statute by the court of any State. We have had recourse only to the history of life insurance, its nature, its abuses and the legislation aimed at its abuses, shown by the con-

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temporaneous history and legislation of the country. Greeff v. Equitable Life Assurance Society, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659, is cited and relied on by appellant. That opinion holds merely that an action at law will not lie to recover a persisting member's share of alleged profits without showing that such profits existed, and that the board of directors had declared a dividend to the class to which the complainant belonged. It was intimated in the opinion that, if there had been a charge of fraud against the action of the directors in failing to make a declaration of dividends, equity would have afforded ample relief to the complainant. Uhlman v. N. Y. Life Insurance Company, 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482, is to the same effect. These cases would have been in point if Spinks had survived the insured term and then had sued to recover dividends. Clause 7 of his policy provided for a distribution in case he survived, or in case he forfeited his right to share in the profits. The Legislature of New York, by section 88, supra, has provided against a forfeiture of his share of this surplus because of his mere failure to pay a premium, but applies his share of the profits then to buy additional insurance—a phase not contemplated by clause 7 of the contract. But though it had been otherwise stated in the contract, we apprehend the statute would have overcome it, and been available to the insured, anything in the contract to the contrary notwithstanding. The proof shows that there was a very considerable surplus belonging to the class of which Spinks' policy was one. Its size in figures is not shown. But it appears that the company paid on an average a fraction over 8 per cent. of all premiums as dividends to the other members of that class who

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persisted. It is not an unreasonable inference from the proven facts that the Spinks policy upon the same basis, or upon the basis fixed by the statute, was then entitled to at least as much as 8 per cent. of all premiums he had paid. In other words, all premiums of this class were loaded 8 per cent. or more above what was actually required to pay the interest to stockholders, and all expenses of maintenance, extension and losses.

Appellant complains of this method of ascertaining what the Spinks policy's share of the surplus was, as in the method actually employed by appellant in declaring the subsequent dividends all lapsed policies, such as Spinks' was treated to be, were ignored, whereas, if they had been included, the result would have been different, and the dividends less, it would seem. The record discloses a novel procedure by appellant in the matter of distributions of surplus. No account was kept with any policy. Nor were they classified. All collections were treated alike in the bookkeeping. Periodically the board of directors, in looking over the company's affairs, would decide that so many thousands of dollars could be spared judiciously in dividends to policy holders. Then that sum was apportioned among all policies maturing in that year, or whatever period of time may have been selected for the purpose. This seems to be justified in the opinion of the company upon the supposition that it had the right to declare dividends or not, and as much or little as its directors chose. We are not called upon in this case to pass on any feature of this method of doing business other than that of keeping the accounts so that it may be ascertained by those in interest what they are entitled to receive. The company, as a mutual company, is

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bound to treat the accounts of its policy holders as if they were cestuis que trustent. Every one who assumes for pay to handle the funds of another to a specific end ought to be supposed to keep accounts, and not to mingle them so as to balk every reasonable effort to get at just what is owing. The matter of keeping a fair, correct account in this matter does not appear so difficult as to be excused. If 1,000 persons were insured in 1884 for a term of 10 years, they naturally formed a class. An account of all premiums collected from that class is not difficult to be kept, nor is it unreasonable to require it. It should show the deaths in the class. The expenses and losses of the whole business could be apportioned among all the policies, the proportion of this class being charged to the class. In this way its share of "surplus" or overcharge of premiums would be easily ascertained in any year. A failure to keep the books so that the interested parties could, with reasonable facility and certainty, see what their interests in their property was, is itself a fraud upon their rights. Although it is true that, in the matter of contracting for insurance between the insurer, and insured, the result is to be regarded as a contract which is to be construed as such, and the liabilities of the parties enforced as such, still, their relations may be also more than that of simple contracting parties. We think it was incumbent on the insurer to keep intelligible and accurate accounts with its policy holders as classes, so that it could be seen from the books just what was due to be distributed to each, and, if it failed to do this, it will not be allowed to profit by the confusion occasioned by its failure.

But the failure to keep such books does not leave the policy holder without remedy, or the court without

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power to judge the matter. If a party charged with the duty of keeping true accounts neglects to do so, the law indulges no presumption in his favor because of the absence of such evidence. And, if a party, having accounts in his possession which presumably show the amount of dividends to which a claimant was entitled, shows that it has paid uniformly 8 per cent. to other claimants and denied the suing claimant any, because it was deemed he has forfeited his right to it, it will be presumed against such party from his failure to keep and produce accurate accounts of the transaction, and from his failure to produce the evidence in his control showing the true, or the approximate, state of the accounts, that such as he did keep and produce were no less favorable to him as applied to the case on trial than the facts warranted. We find evidence in this record that, if 8 per cent. of all his premiums paid had been ascertained as Charles Spinks' share of the undivided surplus as of the date of his default, it would have extended his policy much beyond the period of his death. Indeed, a much less rate would have done so. Equity regards that as done which should have been done. Appellant was applied to to extend the policy by applying, not only the reserve, but dividend additions to purchasing such insurance. The law required appellant to issue a certificate of insurance therefor. In the certificate which it issued appellant stated that the time extended was all that the convertible value would buy. We find this was not true; the value of Spinks' "dividend additions" was not applied by the company in extension of the policy. The effect of the application and the statute is that the policy was extended beyond the date of Charles Spinks' death, by applying the ascertainable value of

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the dividend additions of that policy to the purchase of such extension. This result coincides with the conclusion reached by the circuit court.

Wherefore the judgment is affirmed.

RESPONSE TO THE PETITION BY APPELLANT FOR REHEARING JUNE 26, 1907, BY CHIEF JUSTICE O'REAR.

This case was orally argued before this court on May 2, 1907, on appellant's petition for rehearing. The original opinion was delivered October 19, 1906. Since the opinion appellant has made a complete change of its position in this case, utterly and expressly abandoning its former contention, and now urging that "dividend additions" is a technical term employed in life insurance which is old and well known, and means altogether a different thing from what the court has found, as well as from what appellant originally argued.

Appellant's change of base should detract nothing from the correctness of its present attitude. if it is correct; but it may furnish a very tangible illustration of the error of its present contention on its merits, for it may illustrate that the use of the term is not so well known, even in insurance circles, and therefore not presumably used entirely with reference to its technical sense. The question is: How did the New York Legislature employ the term "dividend additions?" The question is one of more than incidental importance. We have the same expression in the nonforfeiture insurance statute of this State. The construction given the one would doubtless be held to apply also to the other. We are referred by

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counsel for appellant to certain histories of life insurance in which it appears that "dividend additions" was a term sometimes employed in life insurance to represent additional insurance set apart by the insurer to a policy whose dividends had accumulated to a period of distribution, and which had not been otherwise applied. For example, it is said: "The method of dealing with the surplus on policies entitled to participate therein, which was intended by the founders of the Equitable of London, was, as we have seen, to divide the same to the insured at frequent intervals in cash. The method actually adopted by the Equitable of London, as we have also seen, was to grant reversionary bonuses, payable at the death of the insured, and to make apportionments every seven years. The application of surplus earnings to purchase reversionary bonuses, known in this country, as 'paid-up additions,' 'reversionary additions,' or merely 'dividend additions,' was also employed in this country at an early date." Dawson's Elements of Life Insurance, p. 105. It is quite likely that some companies did, and may yet, issue policies which permitted that privilege; but we are unacquainted with any statute which required it, or with any general practice of the insurance companies which permitted it. There is nothing in this case to show that appellant does now, or ever did, indulge the practice. Still that might shed but little light on the true construction of the statute under consideration. Appellant's contention now is that this expression "dividend additions" is a term of art, and has now, and always had, but the one meaning, which is those additions to the principal sum insured which the divisible surplus would buy as paid-up insurance for the insured, payable at his death, as

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the principal insurance was. That form of insurance is believed to have been rare, as compared with the bulk of all insurance. That it is indulged by some companies, and possibly would be written by all, need not be doubted. But the fact remains, as is most evident by a cursory glance at the statements of any of the old line insurance companies, that the "surplus" was not generally so employed. If it had been, the ernormous surpluses, advertised as evidence of good management, and really evidences of oppressive management, could not have existed.

But we are entitled to look beyond the technical meaning of terms used in a statute to ascertain the intent of the Legislature, if the meaning of the language of the act be obscure. One of the first, and one of the surest, sources of information, is to look to the evil that was intended to be remedied. In this instance what was the evil? It assuredly was not that insurance companies were unjustly forfeiting that part of the insurance which had been paid up in full. That is precisely what a "dividend addition" is, as described by Dawson, and now contended for by appellant. Those companies that applied the "surplus" to buying additional paid-up insurance for the beneficiary were those whose sense of equity, without coercion from the Legislatures, had led them to adopt the measure. They were not, and none others in considerable instances were, so far as we know, forfeiting such additions at all. Indeed, there was no ground whatever for doing so. As they, in any event, were fully paid up, nothing in the way of failure to pay premiums to keep up other insurance by the assured could possibly affect them. But there was in 1879 and 1880, and had been for a decade or more previous, a crying evil in life insurance, which had

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aroused widespread bitter feeling, and had brought the management of insurance companies under severe criticism; and that was the unjust, unconscientious, inequitable practice of forfeiting the reserve, as well as accumulations of "tontines" in event of a failure of the insured to pay each recurring premium. The bubble that had grown to the most noticeable proportions was that of the "tontine" feature, a pure hazard. But many companies issued "semitontine," "free tontine," and other policies partaking more or less of the character of the pure tontine, which, as has already been pointed out, was not insurance at all, strictly speaking. Among those mentioned was "deferred dividend" policies. They were, if you died before the period arrived for declaring the "dividend" out of the "surplus," you got no part of the "surplus"—that went to those who survived the "period of distribution" (which, by the way, is the class to which the policy in the case at bar belongs). If you did not die, but failed to pay a premium, you forfeited your part of the "surplus" and everything else under your contract. If you survived the period of distribution, you would be entitled to have distributed to you by the company what it might then be pleased to apportion to your policy. There was not much chance for the company to lose anything by following the plan. There was about as small a chance for the policy holder to get anything out of it. Millions of insurance of this character was being written. The first "tontines" originated by the Equitable of New York and adopted by the New York Life and others, had begun to mature, and were proving great disappointments. Although many thousands had forfeited their whole investment by nonpayment of premiums, still the survivors got back

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much less than upon any right calculation they had reason to expect. It was this situation that was in a state of popular ferment that led up to the legislation in New York and other states about that time, shown in the statute now under examination. The statute aimed to protect the policy holders in their own, and no more; but equally certainly no less. It would be inexplicable that the Legislature could have intended to protect policy holders from the forfeiture of their reserves, and additions to their insurance bought by a part of the "surplus," and yet allow that their "surplus" which had not been so applied could be forfeited for the same cause which was deemed inequitable and unjustifiable, and which experience has demonstrated was in truth so.

Given that all premiums paid in had been apportioned to (1) paying their share of death claims, (2) their share of expenses, (3) to maintaining the "reserve" to finally redeem the policy, (4) to a surplus which belonged as truly in equity to the policy holders as did the reserve, which surplus may have been partly applied under a limited number of policies to buying additional paid-up insurance, and the remainder of it unapplied, while in the great bulk of insurance there was no provision or practice of issuing "dividend additions" insurance paid for out of the surplus. Now, why should the Legislature have provided against the forfeiture of all of these interests of the insured except the last? No reason is assigned in argument by appellant; and we feel safe in concluding, after a careful study of the question, that there is none. The history of insurance shows that terms which might be deemed technical were frequently changed. Sometimes one term was used to express the idea, and sometimes another.

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They were purposely changed, we have no doubt, to mislead in some instances. Yet the matter of life insurance is of such a nature that its fundamental principles must necessarily remain the same, whatever name they may be called by. As attempted to be pointed out in the original opinion, the insured in reality insure themselves and each other. The excess of premiums collected from them belongs, in a mutual company, to them alone. An evil had grown up of forfeiting the policy holders' "reserve" and "surplus." Legislation was enacted to prevent it. In construing terms employed in the statute, they will be given the meaning which will remedy the evil, rather than a meaning which would leave it partly unremedied.

We conclude that, while "dividend additions" may have meant what appellant contends, the term also meant that fund from which "dividends" were declarable, to-wit: the surplus, whether it had been applied to buying additional insurance or not.

Petition overruled.

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CASE 47.—PROSECUTION AGAINST JOHN SIMPSON FOR THE MURDER OF BUD CASEY.—June 28.

Simpson v. Commonwealth

Appeal from Garrard Circuit Court.

W. C. BELL, Circuit Judge.

Defendant convicted and appeals.—Reversed.

1. Criminal Law—Evidence—Accomplices.—The testimony of accomplices jointly indicted is competent, although the indictment against them be not dismissed.
2. Same—Appeal—Examination of Accomplice—Prejudice.—In a prosecution for homicide, an accomplice having consented to testify, the court admonished him that he was under no obligation to do so, and if he did not care to answer any question he would be protected. Defendant thereupon, in the absence of the jury, asked him several questions as to his willingness to testify and whether he had been offered or expected immunity, which questions the court refused to allow. On the witness' examination before the jury he did not avail himself of his privilege, but testified, and answered defendant's counsel that no one had suggested or promised that, if he would testify, he should be released. Held, that defendant was not prejudiced by the court's admonition of the witness, nor by the exclusion of the questions asked of him in the absence of the jury.
3. Same—Corroboration.—Cr. Code Prac., Sec. 241, provides that conviction cannot be had on the testimony of an accomplice, unless corroborated, and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof. Held, that where, in a prosecution for homicide, the only corroboration of an accomplice with reference to accused was the latter's admission to two witnesses that he was present at the house of deceased on the night prior to the time it was burned, and when deceased was killed, and his admission to another person that he (accused)

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knew something about it, such corroborating evidence was insufficient to sustain a conviction.

R. H. TOMLINSON, WILLIAM HERNDON and J. M. ROTHWELL for appellant.

N. B. HAYS, Attorney General, and CHARLES H. MORRIS for the Commonwealth.

OPINION OF THE COURT BY WM. ROGERS CLAY, Commissioner—Reversing.

At the November term, 1906, of the Garrard circuit court, John Simpson, Jones Simpson, and Curt East were jointly indicted for the murder of Bud Casey; the indictment charging each defendant with the main offense and each of the others as an aider and abettor, and further charging that the murder was committed by either striking the deceased with a blunt instrument or by burning his house. When the case was called for trial Curt East asked for a separate trial. John Simpson and Jones Simpson were then tried, convicted, and their punishment fixed at confinement in the penitentiary for 21 years. John Simpson alone appeals.

The following facts may be deduced from the evidence: About 1 o'clock on the morning of Monday, September 17, 1906, the neighbors were attracted to the house of Bud Casey by the light of flames. When the neighbors arrived on the scene they found the house almost destroyed. They also found the body of Bud Casey "15 inches from the wall and 18 inches from the corner of the house, and it lay almost straight, but a little curved to the right, throwing the right side of his head to the fire." There was a hole in the top of Casey's head, indicating that he had either been struck on the head by some blunt

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instrument or had injured himself in falling. Casey's body was not burned to any great extent. His clothes were burned off, and the grass was green under his body, whilst it was burned and scorched in all other places around him. The body of Nath Taylor was found inside of the building after the fire had subsided. He was so badly burned that he was recognizable only from prominent marks on his person.

Curt East, one of the parties jointly indicted for the murder of Casey, swears that on the morning before the house was burned he was at the home of Bud Casey, having gone there with Jones Simpson. Nath Taylor gave Jones Simpson a dollar to buy whisky with, and, upon his insisting, Curt East went to buy and did buy the whisky, and they took it to Bud Casey's house. The whisky was distributed, and they all partook of it pretty freely. At 12 o'clock some discussion was had about getting dinner or something to eat. They all stayed around the house during the afternoon. Other persons came in at different times. About 3 o'clock Jones Simpson and witness went to the house, having been out in the yard or orchard engaged in some sort of game, and when they arrived there Casey had the door locked, and Jones, who had a stick in his hand, told Casey that if he did not open the door he would burst the door open. Casey finally unlocked the door, and the witness, Nath Taylor, and Jones Simpson went for some cider, but did not get any at that time. Casey was under the influence of liquor, and witness tried to get him away for some purpose. He started away, but lay down under a tree, and Jones Simpson, went to him and brought him back to the house. About this time John Simpson, the appellant, came along and joined the crowd, and remained with them until 9 or 10 o'clock. Jones Simpson lost his hat. They all looked

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for it, but could not find it. Jones Simpson told Bud Casey to go after some matches, and if he did not go and get the matches, God damn him, he would kill him. Casey did go to Dick Lamay's and tried to get the matches. Failing there, he went to Dan East's and got some matches. While Jones Simpson was trying to get Casey to go after matches, he was cursing him and kicked him two or three times. Nath Taylor and Jones Simpson also quarreled that evening. After they got back to the house Jones Simpson and Nath Taylor went upstairs together, and while up there Nath Taylor was heard to groan and call out, "Oh! Lordy, don't hurt me." He was not seen by witness any more after that. John Simpson and witness were in the lower part of the house while this was going on. Bud Casey was with them. Jones came down into the room where the other parties were, grabbed up a lot of straw, and put in the stove, poured oil on it and also on the floor, and set fire to the straw in the stove. Bud Casey went to bed and lay down. After the fire was started, Jones Simpson told Casey to get up and hunt his hat or he would kill him. Witness found Jones' hat, and Jones grabbed a stick of wood from the fire and threw and hit Casey and set the bed on fire. That fire, as well as the fire upon the the floor, was put out. John Simpson and Jones Simpson then grabbed Casey and took him upstairs. They remained up there some 15 or 20 minutes. While up there witness heard them walking around; but, upon cross-examination, he also stated that he heard some groaning. When John Simpson and Jones Simpson came down, they and witness started off together. John Simpson separated from them and started toward his home. After witness and Jones Simpson had gone some distance, the attention

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of East was attracted by a light, and on looking back he discovered it was Casey's house, and that it was burning in the upstairs portion of the house. Witness asked Jones Simpson if they had left the house on fire so it would burn them up, and he answered: "I don't care if it does burn down. I have got them locked up anyway." Witness also states that Jones Simpson said two or three times during the afternoon: "Bud, God damn it, I will kill you, and set the house on fire, and walk off in the light of it." The next morning John Simpson came over to Jones Simpson's house and said, in substance: "We have played hell. We will be arrested before dinner." And John then began to fix up a story for them to tell in order that they might escape.

Many other witnesses testified, but none of them mentioned the name of John Simpson, except Calvin Locker, Thompson Hill, and Prentice Walker. Calvin Locker said that he met John Simpson between 8 and 9 o'clock the morning after the fire, and John said that he left the house between 11 and 12 o'clock, and nobody was there except Nath Taylor and Curt East. Thompson Hill said that, according to his remembrance of it, John Simpson testified before the coroner's jury that he left the house between 8 and 9 o'clock. Prentice Walker testified that John Simpson said he was in jail for nothing, and that he told him (Walker) that he (John Simpson) knew something about it.

The following errors are assigned: (1) The indictment against Curt East should have been dismissed before he was permitted to testify. (2) The admonition of the court to the witness East went further than the law permits, and witness East was not permitted to testify as to any immunity or promises held out to

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him by the Commonwealth. (3) The evidence of the accomplice, East, was not sufficiently corroborated.

The question involved in the first error assigned has already been passed upon by this court in the case of Powers v. Com., 114 Ky. 237, 24 K. L. R. 1007, 70 S. W. 644, 1050, 71 S. W. 494, wherein the court held that the testimony of accomplices jointly indicted is competent, although the indictment against them be not dismissed. After the witness East had consented to testify, the court admonished him as follows: "And you don't have to testify at all about anything that occurred down there if you don't wish to. Not only that, but if you, in the course of the examination, come to any question that you don't want to answer, you don't have to answer it, and you will just signify to the court, and you will have full protection. Understand that, in the inception of the examination and at any time during your examination, if you don't want to answer the questions, signify it to the court, and you will be protected." Counsel for appellant then asked several questions in reference to the witness' willingness to testify, and also in reference to whether or not he had been offered or expected immunity for testifying. To each of these questions the court sustained an objection, but counsel for appellant made no avowal as to what his answers would be. It appears, however, that the admonition of the court and the question thereupon asked, as referred to above, all took place without the jury being present. When the witness was placed upon the stand and began his testimony, he never once availed himself of the privilege offered by the court, but testified freely and fully. Upon the cross-examination witness was asked and aswered the following questions: "Q. Did anybody ever make the sugges-

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tion to you that if you told this that you could get out of it? A. They did not; no, sir. Q. Or that it would be your only way to get out of it? A. No, sir. Q. Not at any time? A. No, sir." While we do not think that any error was committed by the court in sustaining objections to the questions asked of witness not in the presence of the jury, yet, even if it was error, the propounding and answering of the foregoing questions, which virtually covered the same points involved in the questions asked him when the jury was not present, were sufficient to overcome the effect of the erroneous ruling. We do not think, therefore, that either the admonition of the court or the objections sustained to the questions referred to prejudiced in any way the rights of appellant.

The only other question remaining to be decided is whether or not the testimony of the accomplice, East, is sufficiently corroborated. It is the contention of the Commonwealth that East is not an accomplice; but, taking his own version of the affair in connection with the statements if other witnesses who have testified, we have reached the conclusion that he is an accomplice, and that his testimony must be regarded as that of an accomplice. In view of the instructions given to the jury, the trial court evidently entertained the same opinion. We will proceed, first, to discuss what kind of corroboration is necessary. Section 241 of the Criminal Code of Practice is as follows: "Conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof." In interpreting this section, this court, in Bowling v. Commonwealth, 79 Ky. 604,

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said: "It is clear, under the section of the Code quoted, that the uncorroborated testimony of an accomplice is wholly insufficient to convict the accused of crime, or any one of its constituent elements, or to render admissible any confessions or admissions of the parties which depend upon and must be preceded by evidence of the conspiracy, unless other evidence besides that of the accomplice is produced tending to prove a conspiracy and connect the accused therewith; and evidence merely showing that the offense was committed and the circumstances thereof is as insufficient for that purpose, as it would be to connect the accused with the commission of the offense itself." In Miller v. Commonwealth, 78 Ky. 15, 39 Am. Rep. 194, we have the following: "The intent and meaning of the statute is that the corroboration must extend to every fact necessary to establish the fact that the offense charged was committed and that the prisoner was the perpetrator." Russell on Crimes (2d Ed.), p. 964, lays down the rule as follows: "There is a great difference between confirmation as to circumstances of the felony and those which apply to the individual charged. The former only prove that the accomplice was present at the offense. The latter show that the prisoner was connected with it. This distinction ought always to be attended to." In Chambers v. State (Tex. Cr. App.), 44 S. W. 495, the court says: "It makes not the slightest difference how thoroughly the corroboration of an accomplice may be in regard to facts related by him, yet unless there is some proof, independent of his testimony, tending to connect the defendant with the commission of the crime, there is no sufficient corroboration." In Commonwealth v. Bosworth, 22 Pick (Mass.), 397, it is said: "We think the rule is that the corroborative evidence must relate to some portion of the testimony

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which is material to the issue. To prove that an accomplice had told the truth relative to the irrelevant and immaterial matters which were known to everybody would have no tendency to confirm his testimony involving the guilty party on trial." In the case of State v. Willis, 9 Iowa, 582, the court said: "The corroborating evidence in this case tended merely to show that an offense had been committed and the manner and circumstances of its commission, but had no tendency to connect the defendant therewith, unless it should be held sufficient to convict a man of burglary that he is seen drunk and in company with a burglar at or near the time and place when and where the burglary is committed. However well-grounded a suspicion this may justly authorize, we do not think it affords the corroborating testimony contemplated by the statute."

The testimony of the accomplice, East, is corroborated as to several unimportant and immaterial matters; but the only corroboration of his testimony in reference to John Simpson is the admission of Simpson to two witnesses that he was present at the house of Bud Casey on the night prior to the time it was burned, and his admission to another person that he knew something about it. The presence of John Simpson at the house of Bud Casey has no more tendency to connect John Simpson with the murder of Casey than did the sight of the man in company with a burglar have to convict him of burglary; and surely the statement that he knew something about it could not be deemed sufficient to connect him with the crime, for, if that were the case, every witness of a crime, if accused by an accomplice, would be in danger of having his testimony interpreted in the same way. It may be that upon a new trial additional facts will be

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developed; but, after an examination of the record before us, we are of the opinion that the testimony of the accomplice, East, is not sufficiently corroborated by other testimony tending to connect appellant with the crime with which he is charged, and that the trial court should have peremptorily instructed the jury to acquit appellant.

Judgment reversed, and cause remanded for new trial consistent with this opinion.

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SEPTEMBER TERM, 1907

CASE 48.—ACTION BY STACEY HAMBY AND OTHERS AGAINST THE CITY OF DAWSON SPRINGS AND OTHERS.—September 10.

Hamby v. City of Dawson Springs

Appeal from Hopkins Circuit Court.

J. F. GORDON, Circuit Judge.

From an order refusing to dissolve an injunction, defendants appeal to a judge of the Court of Appeals to modify or dissolve it.—Motion overruled.

Mines and Minerals—Mineral Waters—Subterranean Flow—Diversion—Injunction—Adequacy of Legal Remedy.—An owner of land who opened a street and acquiesced in the act of the Legislature establishing a town owns the soil of the street subject to the public easement to use the street for municipal purposes, and he may enjoin the town from putting down a well in the street to strike the vein of mineral water supplying a well on his land, not for the purpose of obtaining water merely, but to supply the mineral water free to all, the attempt of the town, being an attempt to take the owner's property for public use, without compensation, and a judgment for damages affording inadequate relief.

WILLIAM H. YOST for plaintiff.

JONSON & JENNINGS for defendant.

(No briefs.)

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OPINION OF THE COURT BY JUDGE HOBSON.—In Chambers.

The plaintiffs own a lot in the city of Dawson Springs, in which there is a valuable well known as the "Hamby well," from the water of which are manufactured the Dawson salts. The water from the well is also used by the guests at the Hamby Hotel, and has acquired considerable reputation for its curative properties. The plaintiffs enjoy a valuable royalty from the well by reason of its being used for the making of Dawson salts and by persons drinking the water for their health. The plaintiffs' lot fronts on Main street. Their well is near the street. The defendants are about to put down a well in the street within 1½ feet of the edge of the pavement on the west side, 21 feet east of the well, and just opposite it. They have put down a number of wells in the street, but, failing to strike the vein of water that supplies plaintiffs' well, they began to put down the well opposite it, when this suit was filed enjoining them from putting down the well. The circuit court refused to dissolve the injunction, and this application is now made to me as judge of the court of appeals to modify or dissolve the injunction.

Hamby did not convey to the town the fee in the street. He simply opened the street and the legislature established the town. He acquiesced in the act of the legislature. The town thus took the street, but it took nothing but the street, with such rights as were fairly included in the grant of a street. The defendants first put down a well about 98 feet from Hamby's well. Then they put down another 59 feet from it. Then another 36 feet from it. They then began the

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well in controversy. In all the wells they put down they struck water. Before these wells were dug, there were a number of other wells furnishing all the water for ordinary purposes that the town required. The facts therefore show that the defendants were not seeking to obtain water merely, but to obtain Hamby's water. In other words, Hamby's well, which is valued at something like $50,000, was attempted to be made valueless to him by the opening of a well 21 feet from it, which would be free to all and supply the same water. The grant by Hamby of the street to the town carried with it no such right. In 27 Am. & Eng. Encyc. of Law, p. 148, the rule is thus stated: "As a general rule the public has only an easement in the streets, the fee remaining in the landowner, subject merely to the right of the public to the use of the street for street purposes." In Elliott on Roads and Streets, section 17, it is said: "The right of the public in a street is by no means confined to the surface of the way, and this all who set apart land for a street are conclusively presumed to know. 'Street' means more than the surface. It means the whole surface, and so much of the depth as is, or can be used, not unfairly, for the ordinary purpose of a street. It comprises a depth which authorizes the urban authority to do that which is done in every street, namely, to raise the street, and lay down sewers, for at the present day there can be no street in a town without sewers, and, also, for the purpose of laying down gas or water pipes. 'Street' therefore includes the surface and so much of the depth as may not unfairly be used as streets are used."

The conveyance of lots bounded by a street passes the title to the center of the street. Jacob v. Wool-

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folk, 90 Ky. 426, 12 Ky. Law Rep. 400, 14 S. W. 415, 9 L. R. A. 551. The owner of a lot abutting the street is presumed to own the soil to the center of the street subject to the public easement to use the street for municipal purposes as authorized by law. Edminson v. Lowry, 17 L. R. A. 275, 3 S. D. 77 52 N. W. 583, 44 Am. St. Rep. 774. While a town may put down a well in its streets to obtain necessary water for public purposes, it has no right to hunt in the streets for a vein of mineral water, the private property of the abutting landowner, so as to take this private property for public use without compensation to him. The facts show beyond doubt that the defendants were trying to find Hamby's water. If their well in controversy was not a success in this respect, it would have been valueless to them. If it had been a success in this respect, the court would not have allowed them to use it to the prejudice of Hamby. The right to minerals under the surface did not pass to the town by the grant of the street, although it had the right to obtain water for ordinary purposes. A grant of a street, like any other grant, must be construed to carry with it only such things as were reasonably within the contemplation of the parties at the time. It was not within the presumed intention of the parties at the time the street was established that the town might put down wells to make free to the public valuable mineral rights under the surface; and, although the growth of the town might be accelerated by this, it is none the less an invasion of private right. There are some well-defined exceptions to the rule that motive is immaterial where the act is not unlawful. One of these exceptions is in the case of oil, gas, or mineral water under the ground. Where they come from, whither they go, by what laws they are gov-

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erned, are things little understood. In dealing with these each owner must so use his own as not unnecessarily to injure his neighbor. Each owner may take what he needs, but he may not impoverish his neighbor, nor waste the common supply. Louisville Gas Co. v. Louisville Heating Co.. 117 Ky. 71, 25 Ky. Law Rep. 1221, 77 S. W. 368, 11 Am. St. Rep. 225, 70 L. R. A. 558. Although the town may put down in the street enough wells to obtain the water necessary for ordinary public purposes, it cannot be allowed to put down other wells for another purpose when palpably there is no necessity for them. The town is not the owner of the fee. It has no property in the minerals beneath the surface, and has no right to interfere with them except so far as the exercise of its easement may authorize.

This is not a case therefore of "damnum absque injuria," nor is there any adequate remedy at law. It is an attempt to take plaintiffs' property for public use without compensation, and they are entitled to protection by law in the enjoyment of their own. A judgment for damages might be a very inadequate remedy for the injury done. There is such a probability of injury to the plaintiffs as to justify an injunction. If the well should not strike Hamby's vein of water, it would be valueless, and the injunction would do defendants no harm. If it should strike Hamby's vein, it would do Hamby great injury. The number of wells now in existence and their condition conclusively show that defendants have all the water they want; and, their motive in putting down the well in question being apparent, the court will not shut its eyes to the facts. In Hawesville v. Hawes' Heirs, 6 Bush 232, the fee was vested in the town. The opinion rests on this ground, and is not therefore author-

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ity here, as the fee was not conveyed by Hamby to the town.

The motion to dissolve the injunction is overruled.

CASE 49.—GEORGE P. HUBER WAS CONVICTED OF PERMITTING A NUISANCE ON HIS PREMISES AND APPEALS.—September 19.

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Commonwealth v. Huber

Appeal from Campbell Circuit Court.

A. S. BERRY, Circuit Judge.

Motion by appellee to strike bill of exceptions from the record and to dismiss the appeal.—Motion overruled.

1. Criminal Law—Bill of Exceptions—Right to Make Bill. — Though an appeal in a misdemeanor case is allowed only from a final judgment, yet it is not improper practice to preserve by bill of exceptions the proceedings on a trial which for any reason had been set aside, so that, after final judgment entered and appeal prosecuted therefrom, error claimed to have been committed on the previous trial could be examined, and, if permissible, corrected.
2. Same—Appeal by Commonwealth—Misdemeanor Case—Time of Appeal.—Cr. Code Prac., tit. 9, art. 2, sec. 347, provides that the Court of Appeals shall have appellate jurisdiction in prosecutions for misdemeanors where the fine exceeds or could exceed $50, or there is or could be a judgment of imprisonment for a period exceeding 30 days. Sec. 352, as amended by Act March 21, 1904, p. 145, c. 65, provides that a judgment on a verdict of acquittal of an offense the punishment of which is imprisonment shall not be reversed, but "in such cases" an appeal may be taken by the Common-

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wealth when important to the correct administration of the criminal law. Held, that the words "such cases" should be referred to the words "an offense the punishment of which is imprisonment," and that an appeal by the Commonwealth would lie in a misdemeanor case, even before a final judgment.

On final trial October 2.

1. Gaming — Keeping Poolroom — Evidence — Admissibility.—In a prosecution for keeping a poolroom, evidence that there was no disturbance of the peace in the place or annoyance to the neighborhood was inadmissible, being immaterial.
2. Criminal Law—Appeal—Matters Reviewable.—Under Cr. Code Prac. Sec. 281, providing that decisions upon motions for new trial shall not be subject to exception, the Court of Appeals cannot consider any question presented to the Circuit Court only on motion for new trial; the granting or refusal of a new trial being within the discretion of the circuit courts in criminal cases.

N. B. HAYS, Attorney General, JAMES S. MORRIS and CHAS. H. MORRIS for appellant.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR on Motion to Dismiss Appeal.

Under an indictment charging appellee with suffering a nuisance on his premises he was tried and convicted. The circuit court set aside the verdict and granted the defendant a new trial. The Commonwealth has appealed from the decision of the circuit court. The pending motions are by appellee to strike the bill of exceptions from the record and to dismiss the appeal.

The motion to strike the bill of exceptions from the record is based upon the same ground that the motion to dismiss the appeal is, namely, that an appeal does not lie in a misdemeanor case, except from a final judgment. Though it were true that appeals in misdemeanor cases were allowed only from final judgments, nevertheless it would be not improper practice

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to preserve by bill of exceptions the history of a trial which for any reason had been set aside by the trial court, so that after the final judgment should be entered, and appeal be prosecuted from it, errors claimed to have been committed upon the previous trial could then be examined into, and, if permissible, be corrected. The bill of exceptions in this case is approved and signed by the presiding judge, and was filed in due season as part of the record. The motion to strike is overruled.

The other question is not so free from difficulty. Appeals to the court of appeals in misdemeanor cases are regulated by article 2, tit. 9, Cr. Code Prac. (sections 347-356). By section 347, Cr. Code Prac., appeals are allowed to the Commonwealth as well as to the defendant from final judgments, where the fine exceeded or could have exceeded $50, or where there was a judgment of imprisonment, or could have been, for a period exceeding 30 days. By section 352, as it was before the amendment of 1904, it was provided: "A judgment on a verdict of acquittal of an offense, the punishment of which is imprisonment, shall not be reversed." As to felonies it is provided (section 335, Cr. Code Prac.) that an appeal shall only be taken on a final judgment, except on behalf of the Commonwealth. Section 337, Cr. Code Prac., regulates the manner of prosecuting appeals by the Commonwealth from any decision of the trial court. Such appeals are not to suspend the proceedings in the circuit court. They seem to be allowed mainly because "it is important to the correct and uniform administration of the criminal law." Still, if the Commonwealth's appeal in a felony case could be disposed of by the appellate court before the conclusion of the trial in the circuit court, the opinion certified would be

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"obligatory on the circuit court as the correct exposition of the law." Section 335, Cr. Code Prac. Further, as to felonies, by section 339 it is provided: "A judgment in favor of the defendant which operates as a bar to future prosecutions for the offense shall not be reversed by the court of appeals." In that state of the law the defendant's rights were protected in every case by giving him an appeal from the final judgment. The Commonwealth's interests were sought to be protected by giving her the right of appeal in felonies from any decision of the circuit court whether it was a final judgment or not, so as to have the law declared. In misdemeanors the Commonwealth was given the same right of appeal that the defendant had, which was from final judgments only. But there is a provision in the Constitution which prevents any man from being put twice in jeopardy for the same offense. Consequently, in all felonies, and in all misdemeanors where an imprisonment sentence is permitted, an acquittal is a bar to another trial of the same person for the same offense, although the acquittal was the result of an erroneous trial. Hence sections 335 and 352 Cr. Code of Practice. Under those conditions the Commonwealth was without remedy in erroneous proceedings in those misdemeanor cases where an imprisonment might be inflicted. The legislature set about to correct that condition. So the amendment of 1904 to section 352, Cr. Code Prac., was adopted; the amendment reading: "But in such cases an appeal may be taken by the Commonwealth as provided in section 337 of this Code, when it is important to the correct and uniform administration of the criminal law."

Bearing in mind that it was already then allowed

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to the Commonwealth to prosecute an appeal from the final judgment of acquittal in the circuit court where an imprisonment of more than 30 days might be imposed, we must look further to see what was the legislative purpose in this amendment. The original section (352) providing: "A judgment on a verdict of acquittal of an offense, the punishment of which is imprisonment, shall not be reversed"—is now qualified by the amendment providing that "in such cases" an appeal is allowed to the Commonwealth as in felony cases by section 337, Cr. Code Prac. This language might be construed to mean in case of judgment on a verdict of acquittal, where the punishment might have been imprisonment. But in that interpretation the word "case" is made to apply to a situation; whereas, in law, it is generally used to designate an action or proceeding in court. Still another objection to that interpretation is it does not give the Commonwealth any relief as prosecutor, but leaves it where it was before. The other construction is to refer the expression "such cases" to the preceding clause, "an offense the punishment of which is imprisonment." This is not only more grammatical, but gives a practical meaning and effect to the amendment. It remedies that which the legislature deemed an evil, by placing the prosecution in a position to have the criminal law uniformily applied in all crminal cases, the one in which the appeal was prosecuted, as well as in others to come. The legislature could have had no purpose to shield one guilty of a misdemeanor or punishable by imprisonment, or to show such one any favors not granted to all other defendants in criminal and penal prosecutions.

In this view of the matter, we think the appeal may

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be prosecuted, even before a final judgment in the case. Hence the motion to dismiss is overruled.

OPINION OF THE COURT BY JUDGE HOBSON on final trial certifying law.

The court, on the trial of this case against the defendant, George Huber, for keeping a pool room, allowed him to prove by a number of witnesses that there was no disorder in the house, and that the place was conducted in an orderly, peaceable manner. There was no chance of riot or boisterous conduct. Evidence that there was no disturbance of the peace in the house or annoyance to the neighborhood was immaterial, as nothing of this sort was charged, and the law presumed the defendant innocent as to things not proved. Comth. v. Gannett, 79 Am. Dec. 693, 1 Allen 7. In Ehrlick v. Comth., 125 Ky. L. R. 742, 102 S. W. 290, 31 Ky. Law Rep. 403, we said: "A great deal of evidence was admitted on the part of the appellant tending to show that there was no noise or boisterous conduct at the house, where this pool room was conducted; but that on the contrary, it was conducted with a care to keep down disorders, and to prevent minors, negroes, and women from coming into it. All this character of evidence was wholly immaterial. It ought not to have been admitted for any purpose." The court erred therefore in admitting the evidence referred to.

It is also insisted for the Commonwealth that the court erred in granting a new trial to the defendant. Section 281, Cr. Code Prac., is in these words: "The decisions of the court upon challenges to the panel, and for cause, upon motion to set aside an indictment, and upon motions for a new trial, shall not be subject

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to exceptions." Under this section it has been repeatedly held that this court cannot consider any question presented to the circuit court only on motion for a new trial. The purpose of the legislature in this section of the Code was to restrict the jurisdiction of this court and to leave the matter of granting or refusing new trials wholly to the discretion of the circuit courts in criminal cases. No question of law arises on the granting of the new trial which may be reviewed by this court. Circuit courts have a wide discretion as to the granting of new trials, where, in their judgment, the ends of justice so require. To sum the whole matter up, the new trial in question was granted by the circuit judge on this ground, and his decision of the question, not being subject to exception, is final.

The other questions discussed in the brief were passed upon in the opinion heretofore delivered (104 S. W. 282), and, upon a reconsideration of these questions, we see no reason to modify that opinion.

This is ordered to be certified as the law of the case.

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CASE 50.—PROSECUTION AGAINST P. B. FARRIS FOR SELLING INTOXICATING LIQUORS IN QUANTITIES LESS THAN FIVE GALLONS IN VIOLATON OF A SPECIAL ACT APPLYING TO KNOX AND WHITLEY COUNTIES APPROVED APRIL 15, 1884. — September 19.

Farris v. Commonwealth

Appeal from Knox Circuit Court.
H. C. FAULKNER, Circuit Judge.

Defendant convicted and appeals.—Reversed.

1. Intoxicating Liquors—Offenses—Sales in Prohibited Quantities.—A sale of liquor to several or any one of certain witnesses, in such manner that they or any one of them were enabled to receive a quantity of less than five gallons, is not a violation of the act of April 15, 1884 (1 Acts 1883-84, p. 1404, c. 789), and of the acts amendatory thereof, regulating the sale of intoxicating liquor in the counties of Knox and Whitley, and forbidding a sale of less than five gallons, unless the liquor was so sold with the knowledge, understanding, or design that it would be so received.
2. Same—Criminal Prosecutions—Instructions.—Where, on a trial for selling liquor in quantities less than five gallons, it appeared that several parties met near defendant's residence and agreed to buy whisky, each to share therein according as he contributed, that the whisky was purchased, and, within view of defendant's house, divided among such parties, an instruction that, if defendant had a scheme whereby he, in selling liquor under the guise of selling it in five gallons, arranged to divide it among his purchasers so that they could get it in less quantities than five gallons, and so that such purchasers received their part of the liquor less than five gallons in a way commonly known as a "divide," he was guilty was subject to the criticism that it did not sufficiently connect the purchasers or any one of them with the transaction.
3. Same.—Act April 15, 1884 (1 Acts 1883-84, p. 1404, c. 789), and

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acts amendatory thereof, regulating the sale of intoxicating liquor in the counties of Knox and Whitley, does not restrict the right of a distiller to sell in five-gallon quantities to licensed retailers or wholesalers.

J. N. BRAFFORD and JOHN H. WILSON for appellant.

N. B. HAYS, ATTORNEY GENERAL, and CHAS. H. MORRIS for Commonwealth.

OPINION OF THE COURT BY WM. ROGERS CLAY—Commissioner—Reversing.

Appellant, P. B. Farris, was indicted, tried, and convicted in the Knox circuit court for the offense of selling intoxicating, spirituous, vinous, and malt liquors, or a mixture thereof, in quantities less than five gallons, in violation of the act of the General Assembly of the Commonwealth of Kentucky regulating the sale of intoxicating, spirituous, vinous, and malt liquors, and the mixture thereof, in quantities less than 10 gallons in the counties of Knox and Whitley, approved April 15, 1884, and of the acts amendatory thereof. 1 Acts 1883-84, p. 1404, c. 789. A demurrer was interposed to the indictment and overruled by the court. The indictment is in the usual form and is not subject to criticism.

The undisputed facts show that the appellant was a licensed distiller; that, within 12 months before the finding of the indictment, T. S. Wilson, Bob Smith, and others, met in a public road within 15 or 20 steps of the residence of the appellant, and agreed "to go in" and buy some whisky. Each man who was to share in the whisky signed his name to a paper, showing how much money he had contributed to the fund. When a sufficient sum was contributed, some one of the subscribers went to the premises of

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defendant, purchased a five-gallon keg of whisky, brought it out into the road, and within 75 yards, and in view, of the dwelling house of appellant, divided it among the subscribers in proportion to the amount of money subscribed by each. They used a faucet to draw the whisky, and a can to divide the same, and the witnesses say that "the cup and faucet came out with the keg."

The trial court instructed the jury as follows: "(1) If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, Brit Farris, in this county, and within 12 months next before the date of the indictment, and at the time mentioned by the witnesses, sold directly or indirectly to the witnesses, Wilson, Smith, and Hiram Cain, or either of them, spirituous, vinous, and malt liquors in such manner as that they or either one of them were enabled to receive a quantity less than five gallons to himself, then you ought to find him guilty and fix his punishment at any fine not less than $60 nor more than $100, or, in lieu thereof, imprisonment in the county jail not less than 10 nor more than 40 days, or you may both fine and imprison him within these limits, at your discretion, according to the proof. (2) Or, if you shall believe from the evidence, beyond a reasonable doubt, that the defendant had a scheme, plan, device, arrangement, or subterfuge to which he was a party, and which he had arranged whereby and so that he could sell liquor under the guise of selling it as in five-gallon quantities or over, and did for the purpose and knowing that it was to be divided there on the premises or near by, and he arranged it so as to divide it in that way among his purchasers, with the design or for the purpose, or so as he knew they would get that in quantities less

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than five gallons, and that was part of his scheme to distribute his liquor to the public, he receiving pay therefor, and he did this within 12 months next before the date of the indictment, so as that the witnesses received their part of the liquor, less than five gallons in a way commonly known as a 'divide,' to which he was a party and participated therein by himself or his agent, then he is guilty, and you ought to so find and fix his punishment as in instruction No. 1. (3) If you believe from the evidence, however, that the defendant was engaged in good faith as a distiller in selling his product to the trade--that is to say, to persons who were retailing liquor and who were licensed retailers or wholesalers for that matter, or was selling it in wholesale to such persons, and in that way made the sale in good faith, and not to be divided on the premises under a scheme or plan or device or subterfuge, among the purchasers, so as that they would get it in quantities less than five gallons— then he is not guilty, and you should so find. (4a) If you have a reasonable doubt of the defendant having been proven guilty, then you ought to find him not guilty. (b) If you find him guilty, you may say that he be placed at hard labor one day for each one dollar of the fine and cost, if he shall fail to pay or replevy; but that is a matter within your discretion."

The appellant complains that the foregoing instructions are erroneous and were prejudicial to the appellant. The first instruction is erroneous, in that appellant might have sold the liquor to the witnesses, Wilson, Smith, or Cain, or any one of them, in such manner that they or one of them were enabled to receive a quantity of less than five gallons, without being guilty, unless he so sold the liquor with the

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knowledge, understanding, purpose, or design that it would be so received. Instruction No. 2 is strong and well adapted to cases like the one before us. It may, however, be subject to the criticism that it does not sufficiently connect the purchasers or any one of them with the transaction. Instruction No. 3 is erroneous, in that it restricts the right of the distiller to sell only to persons who are licensed retailers or wholesalers; whereas, the statute requires no such qualification.

This court is of the opinion that the trial court should have instructed the jury as follows: "(1) If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, Brit Farris, in this county, and within 12 months next before the date of the indictment, and at the time mentioned by the witnesses, sold directly or indirectly to the witnesses, Wilson, Smith, and Hiram Cain, or any one of them, spirituous, vinous, or malt liquors in quantities less than five gallons, then you should find the defendant guilty, and fix his punishment at any fine not less than $60 nor more than $100, or imprisonment in the county jail for not less than 10 nor more than 40 days, or you may both so fine and imprison the defendant within these limits, at your discretion. (2) Or, if you shall believe from the evidence, beyond a reasonable doubt, that the defendant had a scheme, plan, device, arrangement, or subterfuge, to which he was a party, and which he had arranged, whereby he could sell liquor under the guise of selling it in quantities of five gallons or over, and with the knowledge, purpose, or design that it was to be divided there on his premises or near by, so that the purchasers, or any of them, would receive less than five gallons as his portion, and that that was part of

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defendant's scheme to sell and distribute his liquor to the public, and that, in pursuance of said plan, device, or subterfuge, he sold the liquor in question at the time mentioned by the witnesses, and within 12 months next before the date of the indictment, to the witnesses, Wilson, Smith, and Hiram Cain, or any one of them, with the knowledge, purpose, or design that they, or any one of them, would receive less than five gallons as his portion of the liquor purchased, then the defendant is guilty, and you ought to so find and fix his punishment as provided by instruction No. 1. (3) If, however, you believe from the evidence that the defendant is a manufacturer or wholesale dealer, and that he, in good faith and in the usual course of trade, sold the liquor in question to the witnesses in quantities of not less than five gallons delivered at one time and not to be drunk on the premises, and not to be divided among the purchasers under a scheme, plan, device, or subterfuge to which he was a party, by which they or any one of them received a portion of less than five gallons, then you should find defendant not guilty. (4) If you find the defendant guilty, you may or not, in your discretion, say that he be placed at hard labor, one day for each one dollar of the fine and costs, if he shall fail to pay or replevy the same. (5) If, from the evidence in the case, you entertain a reasonable doubt of the defendant's guilt, then you should find him not guilty."

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

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CASE 51.—ACTION BY CARLISLE W. PATTON AGAINST THE MADISON NATIONAL BANK FOR THE VALUE OF CERTAIN PERSONAL PROPERTY WRONGFULLY ATTACHED.—September 20.

Patton v. Madison National Bank

Appeal from Madison Circuit Court.

J. M. BENTON, Circuit Judge.

Judgment for defendant, plaintiff appeals.—Reversed.

1. Attachment—Wrongful Attachment—Damages.—A claimant of attached property, who is not made a party to the action, as authorized by Civ. Code Prac., Sec. 29, may intervene in the action and set up his claim, or he may, after judgment sustaining the attachment, sue for the property or its value.
2. Same—Damages.—A claimant of attached property, who seeks damages therefor, can only recover the actual value thereof, in the absence of a showing that the attaching creditor had knowledge that the property was of special value to the claimant.

J. J. GREENLEAF for appellant.

POINTS AND AUTHORITIES.

Reading from Meadows v. Goff, 90 Ky., 540, we find that "a judgment binds no one except the parties to the action or their privies."

Am. & Eng. Ency. of Law, vol. 18, pp. 100, 101; also p. 104; also 109, 110; Carr v. Bob, 7 Dana, 417; Smith v. Clay (3 Cro. c. c., 640).

W. S. MOBERLY for appellee.

The various excuses set forth by appellant in her brief are trifling, and we cannot see that they offer the least excuse for

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her laches; and on the ground that she cannot rely on the negligence of her attorney, as an excuse for the delay, we refer to Am. & Eng. Ency. of Law, 2d ed., vol. 18, p. 11.

AUTHORITIES CITED.

Sec. 29 of the Civ. Code Prac.; Miller v. Desha, etc., 66 Ky. Law Rep., 214, 215; Deposit Bank of Frankfort, etc., v. Thomason, etc., 66 S. W., 605; Ritchie v. Cincinnati, N. O. & T. P. Ry. Co., 21 S. W., 641 (14 Ky. Law Rep., 831); Am. & Eng. Ency. of Law, vol. 16, p. 787 (1st ed.) also same vol., pp. 790, 792, 808; Lee v. Wilson, 5 Ky. Law Rep., 765; Cartnell's exr., v. Allen, 12 Ky. Law Rep., 43; Heaverin, etc., v. Robinson, 21 S. W., 876; 15 Ky. Law Rep., 15, 16; Murphy, etc., v. Cochran's trustee, 80 Ky. Law Rep., 239; Meadows v. Goff, 90 Ky. Law Rep., 540; C. Y. C., vol. 16, p. 202; Am. and Eng. Ency. of Law, 2d ed., vol. 181, p. 111; C. Y. C., vol. 16, p. 176; "Cyc.", vol. 16, p. 152.

OPINION OF THE COURT BY JUDGE NUNN—Reversing.

On the 25th day of October, 1906, appellant filed a petition in which she stated that she was the owner and entitled to the immediate possession of many articles of personal property, which she particularly described, and stated the value of each article; the aggregate value amounting to $291. She also alleged that in the month of January, 1905, appellee bank instituted a suit in the Madison circuit court against G. W. Evans and J. Stone Walker, and caused an attachment to be issued and placed in the hands of the sheriff of the county, which was levied on the property of Evans and Walker, and also levied on the property of this appellant, the same described in her petition, as the property of Evans and Walker; that none of the articles of property were ever the property of Evans and Walker, or any one else save appellant; that at the time her property was levied on the appellee was notified that the articles levied on belonged to this appellant, and she protested

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against the levy on and the sale of the property by the bank, but over her objection and against her consent it caused the property to be sold for the amount stated in her petition. She afterwards filed an amended petition, and charged that a large number of the articles claimed in her petition were heirlooms, given to her by her mother and other members of her family, and to her of far greater value than their actual intrinsic value, and that on account of the conduct of the bank, which caused her the loss of these articles, she had been damaged in the sum of $1,000. Appellee filed a general demurrer to the petition and amended petition, which was sustained. Appellant then filed another amended petition, in which she undertook to give the reasons why she had failed to file an intervening petition in the action of appellee against Evans and Walker, setting up her claim of ownership to the property. In our opinion this amendment was not necessary, and did not aid her cause of action. It is conceded she was not a party to the action of appellee against Evans and Walker; and in our opinion, from the record as it now appears, she was not precluded by any judgment rendered therein.

It is contended by counsel for appellee that the provisions of section 29 of the Civil Code of Practice points out the manner in which a claimant, whose property has been attached, may intervene and set up his claim thereto, and that it is the only method by which a claimant of property that has been attached can assert his claim thereto and have the same adjudicated, and if the party delays until after judgment in the attachment suit he is forever barred from recovering his property or its value. Before this provision of the Code was enacted, a party whose

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property was attached for the payment of another's debt was compelled to take the course that this appellant is now taking and bring an independent action for the recovery of the property or its value; and this provision of the Code was enacted, giving an additional remedy by an intervening petition, that the matter might be settled in one action. Under this and other provisions of the Code appellee might have made appellant a party, or she, by her petition, might have become a party, to the action of the bank against Evans and Walker, and there had the matter finally litigated; but the provisions of the Code do not make it compulsory upon either to so proceed.

Appellee's counsel cites the cases of Miller v. Desha, 66 Ky. 214, Deposit Bank of Frankfort v. Thomason, 23 Ky. Law Rep. 1857, 66 S. W. 605, and others, as sustaining his position that failing to file the intervening petition until after the final judgment in the attachment suit is a bar to the claim of the claimant to the property. The cases do not support his contention. These cases were discussed and considered upon the idea that the claimant of the property was a party to the action, either by intervening petition, service of process, or by the execution of the bond and the retention of the possession of the property by the claimant. It appears that the execution of such a bond by the claimant of the property has the effect to make him a party to the action to such an extent, at least, as will preclude him, after he fails to present his claim to the property before the final judgment in the action in which the attachment was obtained. See cases before cited and sections 214 and 690 of the Civil Code of Practice. It is a well-settled rule that a judgment binds no one except parties to the action and their privies. See

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Meadows v. Goff, 90 Ky. 540, 14 S. W. 535, 12 Ky. L. R. 495. As stated, appellant was not a party to the action of appellee against Evans and Walker, nor was she a privy of either Evans or Walker; and the judgment in that action, selling her property as their property, was and is not binding upon her.

In our opinion the court erred in sustaining a demurrer to the petition, but acted properly in sustaining the demurrer to the amended petition, in which she alleged that a number of the articles of property were heirlooms, that to her were of far greater value than their actual value, and claimed damages for $1,000. It is not alleged that appellee had any knowledge or information of this fact before the property was sold under order of court. If the property is appellant's, its actual value is all she should be permitted to recover under the facts and circumstances appearing in this record.

For these reasons, the judgment of the lower court is reversed, and remanded for further proceedings consistent herewith.

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CASE 52.—PROSECUTION AGAINST THOMAS YOUNG FOR HOUSEBREAKING.—September 20.

Young v. Commonwealth

Appeal from Trigg Circuit Court.

THOMAS P. COOK, Circuit Judge.

Defendant convicted and appeals.—Affirmed.

Burglary—Breaking and Entering.—Where a laborer, occupying a house with the owner, while on leave of absence, obtained the key ostensibly to take away some of his clothing, but with intent to steal property therefrom, and did so enter and steal, he was guilty of violation of Ky. Stats., 1903, Sec. 1162, providing that if any person shall break any dwelling house, and take anything of value, though the owner or any person may not be there, he shall be punished as therein prescribed.

MAX HANBERRY for appellant.

N. B. HAYS, ATTORNEY GENERAL, and C. H. MORRIS for Commonwealth.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

Appellant was convicted of housebreaking. The indictment was returned under section 1162, Ky. St. 1903, which reads: "If any person * * * shall feloniously break any dwelling house or any part thereof, or any outhouse belonging to or used with any dwelling house, and feloniously take away anything of value, although the owner or any person may not be there, he shall be confined in the penitentiary not less than two nor more than ten years."

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Appellant was a laborer on the farm of the owner of the mansion house charged to have been broken into. He seems to have occupied the house with the owner's family. He got leave of absence for several days under pretense of visiting another point. The owners locked up their house and left for the day. Appellant went to the wife of one of the owners, and got from her the key to the house, ostensibly to take away some of his clothing. Thus gaining an admission to the house, he stole and carried therefrom a suit of clothes and other articles, the property of another. The circuit court instructed the jury that if appellant obtained the key by deception, fraud, or device, with the felonious intention to break and enter the house with intent to steal therefrom property of value, and did so enter and steal, it was a violation of the statute. This appeal raises the correctness of this instruction.

The offense involved is akin to the crime of burglary. It has most of the elements of the latter, except that it need not be done in the nighttime, and the offense to be committed after the entry to complete the felony is confined to larceny. So that the decisions bearing upon the essential fatures of burglary are apposite to the question at bar. It is held without exception that any force applied to effect the entry is sufficient to constitute that part of the offense —as, for example, the raising of a latch (State v. Wilson, 1 N. J. Law, 439, 1 Am. Dec. 216), the raising of a window (State v. Boon, 13 Ired. (N. C.) 244, 57 Am. Dec. 555), or pushing open a closed door (State v. Conners, 95 Iowa, 485, 64 N. W. 295). It is also held that there is a constructive forcible entry if by fraud or deception an entry is obtained, as where by a knock at the door the owner is induced to believe

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he is unbarring to a friendly or business call (Johnson v. Commonwealth, 85 Pa. 54, 27 Am. Rep. 622), or by impersonating one having a right to enter an entrance is gained (State v. Johnson, Phil. Law (N. C.) 186, 93 Am. Dec. 587), or obtaining an entrance under a pretense of doing a permissible act and using the advantage to enter other apartments for the purpose of the theft (Commonwealth v. Ballard, 38 S. W. 678, 18 Ky. Law Rep. 872). From all the cases it will be gathered that the crime of burglary, as well as the kindred crime of housebreaking under the statute, is an offense against the security of the habitation. It is the possession that must be invaded to breach the statute. State v. Toole, 29 Conn. 342, 76 Am. Dec. 602; 1 Bishop, Crim. Law (6th Ed.) section 577.

The law regards force and fraud with equal abhorrence; and whether the tenant's possession is invaded by one means or the other for the purpose of stealing from his home is all one in the eye of the law. Conceding that appellant had the right to enter the house in question to take away his own clothes, and had he entered under such circumstances and then formed and executed the intention to steal the landlord's clothes he would not have been guilty under the statute, our case comes down to a narrower state of facts; for, appellant having gone away under arrangement with his landlord, his relation as co-tenant of the house had ceased for the time being. Though he had the right, notwithstanding, to remove his clothes from the house, he had not the right to enter the house for that purpose, except by the consent of the landlord. When, therefore, he simulated that he desired the key for that purpose, but in reality for the purpose of stealing from the house, he

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resorted to a trick that was a fraud upon the landlord, and one that gave him no right of entry, and therefore no protection. The case where one having the right to enter executes a previous purpose to steal is not guilty of larceny (State v. Moore, 12 N. H. 42; Clarke v. Commonwealth, 25 Grat. (Va.) 908) is quite different from the one at bar, where there is no right of entry; the permission and means of entry having been obtained by fraud, and therefore conferring no right (Lowder v. State, 63 Ala. 143, 35 Am. Rep. 9).

We perceive no error in the instructions. The judgment is consequently affirmed.

CASE 53.—ACTION BY THE BOARD OF COUNCIL OF THE CITY OF FRANKFORT AGAINST JERRE BRISLAN ON APPORTIONMENT WARRANT FOR CONSTRUCTION OF A SIDEWALK.—September 25.

Board of Council City of Frankfort v. Brislan

Appeal from Franklin Circuit Court.

R. L. STOUT, Circuit Judge.

Judgment for plaintiff, defendant appeals.—Reversed.

1. Municipal Corporations — Street Improvements — Statutory Provisions.—Ky. Stats., 1903, Sec. 3449, authorizes the common council of cities of the third class to pass ordinances requiring the improvement of streets and alleys by grading, etc., any portion thereof, not less in length than one block, etc. Held that, where property is so situated that it is impracticable to divide the territory including it into squares or blocks, or lay off streets or alleys, the council may, never-

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theless, order the improvement of the sidewalks, curbing, etc., providing the improvements are not less in length than an ordinary block.

2. Same — Block — What Constitutes — How Determined. — Ky. Stats., 1903, Sec. 3449, authorizes the common council of a city of the third class to pass ordinances requiring the improvement of streets and alleys by grading, etc., any portion thereof not less in length than one block. Held that, in the absence of a statutory definition of what constitutes a block, its length is a question of fact to be determined from the evidence.

3. Pleading—Judgment on Pleadings—Submission—Consent that Answer be Taken as True.—Under Civ. Code Prac., Sec. 366, providing that plaintiff shall be entitled to a trial in an equitable action at the first term after the summons has been served, etc., if no issue of fact be made by the pleadings, or if plaintiff consent that the statements of the answer may be taken as true, the averments of an answer will not be taken as true unless plaintiff consents in terms that they shall be so taken, and a motion by plaintiff to submit does not have this effect.

4. Municipal Corporations—Street Improvements—Action to Enforce Lien—Counterclaim—Damages.—In an action by a city to enforce a lien on defendant's lands for street improvements, consisting of a sidewalk, etc., a counterclaim setting up that in constructing the improvements the contractor did not, as required by the ordinance, make the same in front of the defendant's land, but entered thereon and constructed the sidewalk entirely on the land, encroaching thereon for the purpose, and thereby damaging defendant's property, etc., presented a good defense and entitled defendant to prove the damage, if any, to his property by reason of the taking and injury complained of.

WM. CROMWELL for appellant.

T. L. EDELEN for appellee.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

This action was instituted by the city of Frankfort, a city of the third class, to enforce a lien upon

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a lot of ground owned by appellee for apportionment warrants for the construction of a sidewalk, curbing, and guttering along the front of the land and parallel with a public highway. Subsequently, the claim for paving was dismissed, leaving in litigation the amount sought to be recovered for curbing and guttering. Appellee filed an answer and counterclaim in which he set up that the property described in the petition, and upon which it was sought to enforce the lien, did not lie within any portion of the city of Frankfort which was divided into city blocks by streets or alleys, but constituted a body of land which had not been subdivided or laid off into squares or divided by streets, the land being so situated that it was not practicable to lay it off into squares or blocks, or divide it by streets or alleys, and it was averred that the ordinance was void because the board of councilmen had no authority under the statute to make the improvements and charge the property with the cost thereof. Appellee also denied that any contract for the improvement of the property was executed, and affirmatively set up that in constructing the improvements the contractor did not, as required by the ordinance, make the same in front of the appellee's lot, but entered upon his premises and constructed the sidewalk entirely upon his land, encroaching thereon for that purpose from 9 to 13 feet, and in other respects damaging his property in the sum of $600, for which he prayed judgment on his counterclaim. Appellant, in a reply, admitted that the portion of the city of Frankfort in which appellee's property is situated had not been divided into blocks by streets or alleys, but averred that the sidewalk improvements embraced in the ordinance and ordered to be made in front of appellee's property extended

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a distance much longer than an average block in the city, and therefore the ordinance directing the improvements was valid; and in another paragraph denied trespassing on the premises of appellee or otherwise damaging his property. A demurrer filed to the first paragraph of the reply was sustained, and, plaintiff declining to amend, "on its motion the cause was submitted for judgment on the pleadings and exhibits, and the court, being advised, adjudged that the petition be dismissed." From this judgment, this appeal is prosecuted.

Section 3449 of the Kentucky Statutes of 1903, which is a part of the act relating to the government of cities of the third class, provides in part that: "The common council shall have power to pass ordinances to require the improvement of streets and alleys, subject to the mode and manner herein designated, either by grading and paving, or by grading, paving and macadamizing, or graveling, guttering, curbing and paving, or planking of sidewalk, any portion thereof, not less in length than one block, or the whole of any street or alley now established, or which may hereafter be established, or by guttering, curbing, paving and grading any number of feet, not less than a block, upon either or both sides of any street where the same shall be necessary to complete such class of improvement on any square or street. * * * That the council may require by ordinance the improvement of any street or alley simply by grading or graveling or macadamizing, or may require by ordinance the whole of any street to be improved by grading, graveling, or macadamizing, guttering, curbing and paving or planking the sidewalk, the whole or any part not less than one block of any street." The only authority for the improvements here made

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is found in this section, and it is contended for appellee that the power to impose the cost of improvements upon abutting property exists only when the territory within which the improvements are made is divided into blocks; and as it is conceded that the territory in which the appellee's property is located is not divided into blocks, or laid off into squares by streets or alleys, it is argued that the city was without authority to charge the owner with the cost of the improvements.

It is impracticable to divide the territory which includes appellee's property into squares or blocks, or lay off streets and alleys, and the construction contended for would deny the city the right to improve the appellee's property at his expense or compel him to do it. Although property north, south, east, or west of appellee that was susceptible of being laid off into blocks and squares might be improved at the cost of the property owners, and appellee derive benefit and advantage therefrom, he would escape entirely the burdens of the city government made necessary in the improvement of its sidewalks and streets. We do not believe this construction either reasonable or proper. The purpose of the Legislature in using the expression "not less than a block," which appears three times in the section was evidently to require the city, when it undertook to improve streets or alleys, to improve not less than a block in territory divided into squares or blocks, or, if not so divided, to improve not less than a block in distance. To illustrate: Under this section, if the city desired to make new sidewalks, curbing, and guttering in a new locality divided into blocks, it could not require one property owner to improve his property and relieve the adjacent property owner in the same block, but

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must provide for the improvement in the same manner of the sidewalks, guttering, and curbing the full length of the block, so that no favoritism could be shown one abutting property owner or discrimination indulged in against his neighbor. But in that portion of the city that is not and cannot be divided into blocks, or be bounded on one or more sides by streets and alleys, the council may order the improvements of the sidewalks, curbing, and guttering, provided the improvements so ordered are not less in length than an ordinary block. The statute does not mean that no improvements can be made except in territory laid off into blocks and squares, but only that no improvement shall be made for a distance less than the length of a block. Ordinarily, it may be conceded that the word "block" contemplates a territory divided by streets into blocks or squares, or, as defined by Webster, a "block is a square or portion of a city inclosed by streets, whether occupied by buildings or composed of vacant lots." Olsson v. Topeka, 42 Kan. 712, 21 Pac. 219. But, under the peculiar wording of this statute, this construction should not be indulged in, as to do so would deny the city the right to require property owners living in territory within the city that is not and cannot be divided into blocks or squares to contribute their just proportion of the expense of improving the sidewalks, guttering, and curbing in front of their property, and that necessarily enhances its value and results in convenience and comfort to the owners. The fact that the statute does not define the length of a block does not militate against this construction, as it is averred that the improvements extended for a greater distance than the length of a block, and, in the absence of a statutory definition of what consti-

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tutes a block, its length is a question of fact to be determined from the evidence as any other disputed question.

We have not been able to find any case directly in point, although a somewhat similar question arose in the case of Gibson v. O'Brien, 6 S. W. 28, 9 Ky. Law Rep. 639, where the court had under consideration the section of the statute supra. In that case the property owners resisted the attempt to enforce a lien upon the property upon several grounds; one of them being that there was no block or city district adjacent to or abutting on the property; that the territory embraced constituted no block or part of a block. In respect to this contention, the court said: "As to the remaining question necessary to be considered, if it be conceded that the charter permits the improvements of any part of a street equal in length to one block, then it is apparent from the testimony that the distance on each side of Broadway street, from Churchill avenue to the railroad, or to Enders avenue, is equal to two blocks. Some of the blocks in the city are a much greater distance in length than others, but looking to the average, and there are at least two blocks from the beginning of this improvement to its terminus. The length is nearly 900 feet. The definition of a block is not given by the charter, and whether in the sense used a block is constituted by having a street on each side, as a square surrounded by streets, or that the improvement is not to be less in length than that of the average block, still in either event, the charter has been complied with."

It is further insisted for appellee that, as the answer denied the execution of a contract for the improvement, and the appellant with this denial in the record had the cause submitted for judgment on

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its motion, the averments of the answer, must be taken as true; and hence as it stands admitted that no contract for the improvement of the street was entered into, the judgment dismissing the petition was proper. We do not agree with counsel that the submission of the cause on motion of appellant, plaintiff below, had the effect of admitting to be true the averments of the answer. Section 366 of the Civil Code of Practice provides that: "The plaintiff shall be entitled to a trial in an equitable action at the first term after the summons has been served on all the defendants as provided in section 102, if no issue of fact be made by the pleadings; or, if the plaintiff consent that the statements of the answer may be taken as true." Under this section, the plaintiff in an equitable action is entitled to a submission and trial at the appearance term in two states of case: First, if no pleading is filed by the defendant raising an issue of fact; second, if the plaintiff consents of record that the statements of the answer, if one be filed, may be taken as true. The plaintiff in this case, although it moved to submit the action, did not consent of record that the statements of the answer should be taken as true. Therefore it was not entitled to a submission of the case at that term. No objection, however, was made to the motion to submit; counsel for defendant evidently proceeding upon the theory that the motion to submit was in effect consenting that the statements of the answer should be accepted as true. But we do not think this a proper construction of the section. The averments of an answer will not be taken as true, unless the plaintiff consents in terms that they shall be so taken, and a motion by the plaintiff to submit does not have this effect. Gruell v. Smalley, 1 Duv. 359.

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The counterclaim presented by appellee set up a good defense, and upon the trial of the case he should be allowed to prove the damage, if any, to his property by reason of the taking and injury complained of. Whether or not a contract was duly entered into presents an issue of fact that may also be determined on another trial.

The judgment is reversed for proceedings consistent with this opinion.

EXTENSION OF OPINION BY JUDGE CARROLL—Overruling petition for rehearing Dec. 6, 1907.

In a petition for rehearing the point is made on behalf of appellant, that appellee should not have the right to assert, as against the city's claim for street improvements, the counterclaim for damages. The improvement was not made by the city, but by a contractor, and the injury and resulting damage to appellee's property, if any, was committed by the contractor. After completing the contract, the contractor assigned his claim to appellant, and the rule that would deny a property owner the right to assert a counterclaim or set-off against the city, if the work had been done by it, and it was seeking to assert its lien, does not apply. As assignee of the contractor's claim, the city occupies no better position than the contractor, and appellee can set up against it any claim for damages that he could have asserted against the contractor. (Kentucky Statutes, sec. 474; Civil Code, sec. 19.) The doctrine that the property owner may rely upon a set-off or counterclaim in a suit by a contractor is expressly decided in Bodley v. Finley 23 Ky. Law Rep. 851, 64 S. W. 439. The petition for rehearing is overruled.

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CASE 54.—ACTION BY C. L. RAISON, JR., FOR USE, ETC., AGAINST AUGUSTUS H. CLARK TO ENFORCE A JUDGMENT.—September 25.

Clark v. Raison, Jr., for Use, etc.

Appeal from Campbell Circuit Court.

A. S. BERRY, Circuit Judge.

Judgment for plaintiff, defendant appeals.—Reversed.

1. Judgment—Bar to Claim—Availability.—A judgment, in an action to settle an estate, which distributes a part thereof to a judgment debtor, cannot be pleaded as a defense to an action by the creditor to enforce the judgment against the debtor's distributive share; the two judgments being in nowise antagonistic.
2. Process—Warning Order—Requisites.—A warning order against non-resident defendants, husband and wife, which recites, "The defendant," followed by the husband's name, followed by the abbreviation, etc.," without mentioning the name of the wife, "warned to appear," etc., is void as to the wife, and she is not brought into court thereby.
3. Judgment—Set Off—Against Assigned Judgment.—Under Civ. Code Prac. Sec. 19, providing that an assignment of a thing in action shall be without prejudice to any set-off, and Sec. 96, Subsec. 2, authorizing a set-off in an aciton on a judgment, a claim of a judgment debtor against the judgment creditor, which arose before the assignment of the judgment, is a lawful set-off against the judgment in the hands of the assignee.

HODGE & WOLFF for appellant.

POINTS AND AUTHORITIES.

1. The petition does not properly plead judgment: Code sec. 122; Laidly v. Cummings, 83 Ky., 606.

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2. The court had no jurisdiction because the title holder is not before the court. No warning order against her: Brownfield v. Dyer, 7 Bush, 505.

3. It was error to give a judgment upon a domestic judgment.

4. The plea of res judicata is good.

5. The plea of set-off should have been allowed and a judgment given appellant for his balance: Code secs. 19, 96; Merrill v. Souther, 6 Dana, 305; Jackson v. Holloway, 14 B. Mon., 108; Jeffrie v. Evans, 6 B. Mon., 119; Crawford v. Duncan, 6 Ky. Law Rep., 734; Harlem v. Lumsden, 1 Duval, 89.

6. No fraud is proven.

L. C. RAISON, JR., for appellee.

POINTS AND AUTHORITIES.

1. The rule of res judicata can never be applied unless in a case between the same parties, or their privies, and where the same subject matter is involved, and has been litigated.

2. An open and unsettled account cannot be plead and used as a set-off against a judgment especially the assignee of the judgment: Sec. 277, Civ. Code; Pheiffer v. Harris, 74 Ky., 400; McNess v. Owens, 15 Ky. Law Rep., 126; Civ. Code, sec. 86.

3. The judgment of the lower court is correct in holding that the property sought to be subjected to the payment of appellees judgment is the property of A. H. Clark, and was fraudulently placed in the name of his wife, Emma J. Clark, for the purpose of cheating and defrauding the appellee, and that she held the property in trust for A. H. Clark, and ordering it sold for the satisfaction of the judgment.

OPINION OF THE COURT BY JUDGE BARKER—Reversing.

Alfred R. Clark obtained a judgment against his brother, Augustus H. Clark, in the Campbell circuit court, for the sum of $1,185.35, which he assigned to the plaintiff, C. L. Raison, Jr. After a return of nulla bona by the sheriff of Campbell county, into whose hands the execution came, this action was instituted for a recovery and attachment, under the provisions

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of section 439 of the Civil Code of Practice, and also to set aside a conveyance of certain real estate in the city of Dayton, Campbell county, Ky., to Emma J. Clark, the wife of the defendant Augustus H. Clark, on the ground that the property really belonged to the husband, who had procured the conveyance to his wife in order to conceal his property and defraud his creditors. An affidavit was filed of the non-residence of the defendants, and a warning order procured against them, under the provisions of the Code regulating constructive service of process. Afterwards, Augustus H. Clark entered his appearance, and filed an answer in three paragraphs. By the first, he pleaded in bar of the action a judgment rendered in a case to settle his mother's estate and for a division of her property among her heirs at law. In the second, he pleaded as a set-off a claim which he had against his brother, amounting in round numbers to $9,000. By the third, he denied all of the material allegations of the petition as to the fraud by which the property in question was conveyed to his wife, the defendant Emma J. Clark. The court sustained a general demurrer to the first and second paragraphs of the answer, and overruled it as to the third. Afterwards, evidence was adduced on the question of the fraudulent transfer by the husband to his wife, and, the case being finally submitted to the court, a judgment was rendered in favor of the plaintiff, holding that the transfer of the property in question by the husband, Augustus H. Clark, to his wife, Emma J. Clark, was fraudulent, and subjecting it to the payment of plaintiff's claim. From this judgment, Augustus H. Clark is here on appeal.

The trial court properly sustained plaintiff's demurrer to the first paragraph of the answer pleading

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res adjudicata. The claim of C. L. Raison, Jr., is not at all antagonistic to the judgment in the case of Clark v. Clark, in which the estate of Miriam Clark, deceased, was settled and distributed. On the contrary, what is sought in this action is to enforce the judgment in the settlement case, and to subject to the payment of his debt that part of the estate of his mother which the judgment distributed to Augustus H. Clark. A judgment can only be pleaded as a bar to a claim which is antagonistic to it.

A more serious question is presented in regard to the validity of the warning order by which the non-resident Emma J. Clark was sought to be constructively brought before the court. The warning order made by the clerk is as follows: "The defendant Augustus H. Clark, etc., warned to appear in this court within sixty days after the making of this warning order and answer petition, and Fred Bassman is appointed to correspond with and defend for said non-resident defendants. May 20, 1904." It will be observed that Emma J. Clark's name does not appear in the warning order, unless she can be included under the abbreviation "etc." Clearly this is not sufficient to bring her before the court. In the case of Brownfield v. Dyer, 7 Bush, 505, a warning order, which required the defendant to answer at a term commencing 18 days after the date of the order, was held to be absolutely void, although as a matter of fact the judgment complained of was not rendered until a term of the court subsequent to that at which the defendant was warned to appear. In the opinion it was said: "In all proceedings upon constructive service, the provisions of the Code regulating the same must be literally followed. Nothing short of a substantial compliance with every prerequisite will

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give the court jurisdiction of the property sought to be subjected to the payment of the plaintiff's claim. Orders of warning have taken the place of orders of publication under the old practice, and, as the courts could not dispense with any prerequisite of law in making publication, neither can they do so in making orders of warning. The record must show upon its face that the provisions of the Code have been substantially complied with, or the judgment must be treated as void and inoperative." To the same effect are Grisby v. Barr, 14 Bush, 330, and Redwine v. Underwood, 101 Ky. 190, 19 Ky. Law Rep. 366, 40 S. W. 462. A defendant, whose name does not appear in the warning order, cannot be brought into court by it.

The demurrer to the second paragraph of the answer pleading a set-off should have been overruled. The assignment of the judgment by Alfred R. Clark to C. L. Raison, Jr., did not shut off the debtor from pleading, as a set-off against it in the hands of the assignee, any claim created before notice of the assignment and which he could have pleaded against the assignor. This is expressly provided by section 19 of the Civil Code of Practice, which is as follows: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any discount, set-off or defense now allowed; and if the assignment be not authorized by statute the assignor must be a party; as plaintiff or defendant. This section does not apply to bills of exchange, nor to promissory notes placed upon the footing of bills of exchange, nor to common orders or checks." Subsection 2 of section 96 defines a set-off as follows: "A set-off is a cause of action arising upon a contract, judgment or award in favor of a defendant against a plaintiff, or against him and another; and it cannot

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be pleaded except in an action upon a contract, judgment or award." The claim pleaded as a set-off in the second paragraph of the answer is for money alleged to be due from Alfred R. Clark, to Augustus H. Clark, by contract, and by the very terms of the Code can be set off against a judgment in favor of the plaintiff Alfred R. Clark, or his assignee, C. L. Raison, Jr. The case of Pheiffer v. Harris, 11 Bush, 400, does not militate against the conclusion we have reached. There the assignee of a judgment in favor of one party sought to offset it against a judgment in favor of the plaintiff, under section 407 of the old Code of Practice authorizing this procedure; in other words, the two judgments were in the hands of bona fide assignees, and it was a question of prior equities. All that was held in the opinion was that the provisions of the Code, that the set-off should take place with due regard to the legal and equitable rights of all persons interested therein, should be preserved and enforced, and that no set-off would be allowed which would be inequitable. A different status is presented by the second paragraph of the answer. The claim of the judgment debtor Alfred R. Clark arose before the assignment of the judgment to C. L. Raison, Jr., and, if it is valid, constitutes a lawful set-off against the judgment, even in the hands of the assignee, under the provisions of the Code of Practice heretofore set out.

In conclusion, we are of opinion that the judgment against the non-resident defendant Emma J. Clark is void, and that the court erred in sustaining plaintiff's demurrer to the plea of set-off alleged in the second paragraph, and that for these reasons the judgment should be reversed, allowing all parties to amend or plead as justice requires, and for further

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procedure consistent with this opinion; and it is so ordered.

CASE 55.—ACTION BY THE TRUSTEES OF THE CINCINNATI SOUTHERN RY. CO. AND ANOTHER AGAINST A. SLAUGHTER AND OTHERS TO QUIET TITLE TO CERTAIN LAND, INCLUDING A PASSWAY CLAIMED BY DEFENDANTS.—September 26.

Trustees Cin. Southern Ry. Co. v. Slaughter

Appeal from Lincoln Circuit Court.

W. C. BELL, Circuit Judge.

From a judgment of dismissal plaintiffs appeal.—Affirmed.

1. Easements — Ways — Acquisition—Prescription—Evidence—Admissibility.—Where a party asserts a right by prescription to a way, and shows a continuous user thereof for more than 20 years, evidence of user by others living in the neighborhood for a time insufficient to ripen into a prescriptive right as to them is admissible to show that the community regarded the way as free, if not dedicated, to the use of persons to whom it furnished the only way of reaching a public way.
2. Same—Evidence—Findings.—A finding that a party had acquired by prescription a right of way over the land of another held justified under the facts.
3. Same—Presumptions—Burden of Proof.—Where a user of a right of way creates the presumption of a grant, a party assailing the right has the burden of proving that the use of the way was merely permissive.
4. Railroads—Right of Way—Rights Acquired—Notice of Rights of User.—A railway company acquiring for a right of way land over which individuals exercised and claimed a right of way adverse to and by recognition of the owner is chargeable with notice of the rights of the individuals.

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5. Easements—Ways—Acquisition—Prescription—Deviation from Way.—Where no material changes were made in the location of a right of way claimed by adverse user, and the changes made were not made for the purpose of abandoning the way, they were immaterial on the issue of acquisition of a right of way by adverse user.
6. Same—Right of Way—Rights Acquired.—A railway company acquired land for a right of wa yat a time when individuals exercised and claimed adversely a right of way over the same. The railway right of way was 100 feet in width, and the use by the individuals of their right of way did not interfere with the operation of the railway. The individuals used their right of way for more than 20 years under a claim of right adversely to the company and its grantor. Held, that the individuals acquired by prescription a right of way as against the company.

JOHN GALVIN and J. W. ALCORN for appellants.

ROBT. HARDING, M. C. SAUFLEY, EMMETT PURYEAR and GREENE & VANWINKLE for appellees.

(No briefs in the record.)

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

We gather from the record in this case that the village of Moreland, which is situated in Lincoln county and upon the line of railroad owned and operated by appellants, has for its principal thoroughfare the Danville & Hustonville Turnpike Road, and that the railroad runs through its corporate limits nearly north and south, crossing the turnpike a considerable distance north of the town and again somewhat south thereof, after running through the town and almost parallel with the turnpike, between 200 and 300 feet distant therefrom. It further appears that the principal business section of the town is situated on the east side of the railroad, and that appellees, with divers other residents, constitute a

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considerable settlement on the west side of the railroad. The action was brought mainly to quiet appellant's title to a part of its right of way included in a passway claimed by appellees, and to enjoin appellees from using the passway, which runs from their places of residence, respectively, through a part of appellants' right of way to the Carter Road, which latter road crosses the railroad. The answer of appellees admits their use of the passway and asserts their right to it by grant and prescription; it being alleged that they and their vendors have, under claim of right, had more than 15 years continuous possession and use thereof adversely to appellants and all others. The court below, upon the hearing, entered judgment declaring appellees entitled to the passway and dismissing the action, and from that judgment this appeal is prosecuted.

By consent of parties the case was tried upon oral testimony. Owing to the absence from the record of a map, we have had some difficulty in ascertaining the precise location of the passway and places of residence of appellees. While the evidence is conflicting, we are unable to say that the judgment is not sustained by its weight. In other words, considered as a whole, the evidence conduces to show that appellees and those from whom they derived title to their lands had for more than 20 years before the institution of the action, and commencing before appellants acquired their right of way, continuously claimed, occupied, and used the passway; that such user was not permissive, but exercised and enjoyed as a matter of right adversely to appellants and their vendors. One witness testified to a parol grant of the passway by the original owner of the land of which appellant's right of way is a part. It was also made to appear

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that several persons, who in recent years have become residents upon and along what is known as "Haly Lane," use, and, like appellees, are dependent upon, this passway as their only route of travel from their homes to the business part of Moreland, the post office, school, and church, east of appellants' railroad track. While the use of the passway by some of the residents on Haly Lane cannot be said to have continued a sufficient length of time to ripen into a prescriptive right as to them, considered in connection with the previous long use of the passway by appellees and vendors under a claim of right, it is a circumstance tending to show that the entire community regarded the passway as free, if not actually dedicated, to the use of persons to whom it furnished the only way of reaching the Carter crossing.

Accepting the correctness of the chancellor's conclusions of fact, we must conclude that such user of a right of way as appellees and their vendors seem to have enjoyed creates the presumption of a grant. This being true, the burden was on appellants to rebut this presumption by proving that the use of the passway by appellees and their vendors was merely permissive. O'Daniel v. O'Daniel, 88 Ky. 185, 10 S. W. 638, 10 Ky. Law Rep. 760; Bowen v. Cooper, 23 Ky. Law Rep. 2065, 66 S. W. 601; Anderson v. Southworth, 25 Ky. Law Rep. 776, 76 S. W. 391; Chenault v. Gravitt, 27 Ky. Law Rep. 403, 85 S. W. 184; Talbott v. Thorn, 91 Ky. 417, 16 S. W. 88, 13 Ky. Law Rep. 401; Riley v. Buchanan, 116 Ky. 625, 25 Ky. Law Rep. 863, 76 S. W. 527, 63 L. R. A. 642; Commonwealth v. Terry, 27 Ky. Law Rep. 684, 86 S. W. 519; Ray v. Nally, 28 Ky. Law Rep. 421, 89 S. W. 486.

As a railroad company, in the performance of its duties as a common carrier, may require the use of

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its entire right of way (which, after all, is but an easement), for the laying of additional tracks or other purposes appertaining to its business, we would hesitate to say that it should be compelled to yield a passway over its right of way, upon the grounds of prescriptive right or presumed grant asserted by the claimant, however long continued the adverse user, if such user had its beginning after the railroad company acquired its right of way. But no such state of case is here presented, for appellant's right of way is 100 feet in width, and it was neither alleged in the petition, or shown by proof, that appellees' use of the passway will prevent the construction of additional tracks at that point, or otherwise interfere with the operation of the railroad. Besides, according to the weight of the evidence, the use of the passway in question by appellees or their vendors appears to have commenced and was exercised and claimed as a right adversely to and by recognition of the then owners of the land, appellant's vendors, before appellants acquired their right of way, which use on the part of appellees or their vendors continued without interruption until the time of the institution of this action. Appellants, in acquiring their right of way, were therefore charged with notice of appellees' right to the passway, for, as said in Wright v. Willis, 23 Ky. Law Rep. 565, 63 S. W. 991, quoted with approval in Ray v. Nally, 28 Ky. Law Rep. 421, 89 S. W. 486: "The purchaser of land through which an old road passed was charged with notice of the fact that the person using the road claimed the use as a matter of right, as he might have ascertained that fact by inquiring of them instead of inquiring of the vendor, who informed him that the use was merely permissive."

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It appears from the evidence that the passway over appellant's right of way is, and has all along been, a well-defined roadway, showing the use and wear of both vehicles and horses. It is, however, insisted for appellants that more than one change has been made in the passway since its use commenced, and that such changes negative appellees' claim of an adverse use of the passway. We are unable to see the force of this argument. The evidence fails to show any material change in the passway since it was established, or that changes were made with the purpose of abandoning it as a passway. The effect of such changes in a road or passway is commented on in the case of Anderson v. Southworth, 25 Ky. Law Rep. 776, 76 S. W. 391, in the opinion of which it is said: "It is true that one or two changes of the passway were made to straighten the fences of some of the owners of the land, or to get it upon firmer and better ground; but such changes were made by moving it only a few feet, and with no purpose of abandoning it as a passway." Ray v. Nally, 28 Ky. Law Rep. 421, 89 S. W. 486. The views herein expressed are not in conflict with the opinion in Thompson v. Louisville & Nashville Railroad Company, 110 Ky. 973, 23 Ky. Law Rep. 476, 63 S. W. 42. The question for decision in that case was whether or not the appellant Thompson was legally entitled to the use of a passway over the right of way of the railroad company. It was held that he was not, because: (1) The railroad company acquired title to and possession of the right of way over which the passway was claimed from the appellant Thompson's ancestors, Sylvestor and Mary Thompson, by proper conveyances without any reservation of the passway; (2) these conveyances were made prior to the time the appellant acquired title

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to his land by inheritance; (3) the testimony relied on by appellant to establish his right to the passway affirmatively showed that no grant was ever made him of the passway, and failed to show such a continued and adverse user thereof by him or those under whom he claimed as could have ripened his claim into a legal right by prescription: (4) the facts presented by the record were such as to make it manifest that the use of such part of the company's right of way, as would have been included in the passway claimed, was absolutely essential to the operation of its railroad. Thornton v. Railroad Company, 19 Ky. Law Rep. 96, 39 S. W. 694. The following excerpt from the opinion summarizes the court's conclusions: "To create the presumption of a grant of the right of way, the circumstances attending its use must be such as to make it appear that its use was accompanied by a claim of right, or by such acts as manifest an intention to enjoy it without regard to the wishes of the railroad company. The record entirely fails to show such evidence in this case, and it is highly improbable that such a grant was ever made, as it is manifest that the entire right of way claimed by appellant will ultimately become absolutely essential to it in running its road, and the business of the country has rapidly developed since the road was projected, and probably in a very short time double or quadruple tracks will be necessary for the transportation of traffic over its line."

The pertinency of the last conclusion expressed in the opinion supra will be better understood when it is suggested that it is elsewhere stated in the opinion that the right of way of the Louisville & Nashville Railroad Company is only 66 feet in width. Moreover, it appears that the railroad company made in

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that case the defense that the granting of the passway asked over its right of way would not leave it at that point a sufficiency of ground for the proper operation of its railroad. As before indicated, no such defense was or could have been made in the case at bar. The facts appearing in the record would have given it no support. In other respects the case supra is quite unlike this, for here there is evidence out of which arises the presumption of a grant of the right of appellees to the passway, as their use of it has been attended by circumstances which make it appear that such use was accompanied by a claim of right, and also by acts sufficient to manifest an intention on their part to enjoy it without regard to the wishes of appellants.

Judgment affirmed.

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CASE 56.—ACTION BY A. S. MUSSELLAM AGAINST THE CINCINNATI, N. O. & T. P. Ry. Co. AND ANOTHER FOR LOST FREIGHT.—September 26.

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Mussellam v. Cincinnati, N. O. & T. P. Ry. Co.

Appeal from Boyle Circuit Court.

W. C. BELL, Circuit Judge.

Judgment for defendants. Plaintiff appeals.—Reversed.

1. Carriers—Receipt of Freight—Conclusiveness.—A receipt by a carrier for freight, though not conclusive, creates a presumption that it received the freight directed therein, and the burden is on it to show the contrary.
2. Trial — Instructions — Form. — The court should not instruct that the burden of proof is on one of the parties, or that the presumption of law is against him; but the instructions should be so framed as to indicate the burden of proof, without specially referring to it.
3. Carriers—Loss of Freight—Evidence—Instructions. — Where, in an action for loss of freight, the shipper introduced in evidence the receipt of the initial carrier, the court should charge that the jury should find for plaintiff against the initial carrier, unless they believed that the shipper had not deliver the freight to it; and that they should find for him against the connecting carrier, unless they believed that the initial carrier had not delivered the freight to the connecting carrier.
4. Trial—Question for Jury—Effect of Evidence.—Where, in an action against the initial and connecting carriers for loss of freight, it was shown that the connecting carrier receipted for seven boxes and made a written acknowledgment that one box was missing, the credibility of the testimony explaining away the receipt and the acknowledgment was for the jury.
5. Carriers—Question for Jury.—In an action against the initial

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and connecting carrier for loss of freight, held, that the questions whether the freight was delivered to the initial carrier, and, if it was, whether it was lost by it, or whether it was lost by the connecting carrier, were for the jury.

6. Evidence—Statements by Agents—Admissibility.—The statements of an agent or a carrier, who is its representative to deliver freight, that a part of the freight of a shipper was missing, and that it would be along in a few days, were competent against the carrier.

7. Carriers—Loss of Freight—Actions—Evidence.—In an action against a carrier for loss of freight, the bill of lading received by the shipper and the waybills which went with the freight were competent evidence against the carrier, though not conclusive.

8. Trial—Question for Jury.—The credibility of evidence in an action against a carrier for loss of freight, which explains the bill of lading received by the shipper and the waybills which went with the freight is for the jury.

9. Evidence—Notice to Produce Secondary Evidence.—Where a paper is in the possession of a party, the adverse party should before trial notify the party to produce it, or procure a rule for its production, and, where the paper is not then produced, or it is shown to be lost, secondary evidence of its contents is admissible.

10. Same—Similar Transactions.—Where, in an action against a carrier for loss of freight, the carrier showed that the goods could not have been put in the box delivered to it, evidence that the shipper had packed goods of the same description as those in controversy in a similar box was admissible.

11. Property—Evidence of Ownership.—In an action against a carrier for loss of freight, the testimony of a witness that he saw the shipper in possession of goods similar to those alleged to have been lost, is inadmissible.

12. Witnesses—Credibility.—A party testifying in his own behalf should be permitted to state where he has lived and what business he has followed, so as to give the jury a better idea of the weight to be attached to his evidnece.

13. Trial—Evidence—Rebuttal.—Where, in an action against a carrier for loss of freight, a drayman, who took goods of the shipper to the carrier, testified that only six boxes of freight were taken out at the station, and that the shipper told him that he would take the seventh box with his trunk as baggage, it was competent for the shipper to contradict the drayman.

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14. Carriers—Actions—Evidence.—In an action against the initial and connecting carriers for loss of freight, evidence that the waybill, made at the place where the goods were delivered to the connecting carrier, was made out from the waybill which accompanied the car, and not from an inspection of the contents of the car, which was sealed, was admissible to explain how it happened that the connecting carrier receipted for the freight.
15. Same.—In an action against a carrier for loss of freight, evidence of the circumstances of the giving of a receipt by the carrier for the freight was admissible to support the defense that the freight had not been delivered to it.
16. Appeal—Granting New Trial—Discretion.—The discretion of the circuit court in granting a new trial will not be interfered with unless palpably abused.

ROBERT HARDING for appellant.

E. V. PURYEAR and GREENE & VANWINKLE of counsel.

GROUNDS FOR REVERSAL.

We respectfully ask a reversal of the lower court upon the following grounds:

1. Because of the error of the trial judge in setting aside the verdict of the jury and the judgment thereon for $900.00, and granting appellees a new trial.

2. Because of the trial judge's error in the second trial in peremptorily instructing the jury to find a verdict for Cincinnati, New Orleans & Texas Pacific Railway Company.

3. Because of the trial judge's error in withdrawing from the consideration of the jury the receipt given appellant by the Cincinnati, New Orleans & Texas Pacific Railway Company, showing the Southern Railway Company received payment for carrying seven boxes of goods from Knoxville to Harriman Junction.

4. Because of the error of the trial judge in excluding competent testimony from the jury on the second trial of the case.

CHARLES H. RHODES for appellee.

JOHN GALVIN of counsel.

There was never any proof on either trial of this case in the court below that any except the six boxes were ever delivered to the Cincinnati, New Orleans & Texas Pacific Railway Company by

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the Southern Railway Company, and consequently the peremptory instruction by the court to the jury to find for the Cincinnati, New Orleans & Texas Pacific Railway Company was clearly correct, and the two questions of fact presented by the pleadings were submitted to the jury under instructions from the court below that are confessedly fair and impartial, and the jury having found those two facts in favor of appellee, the Southern Railway Company, we submit that the judgment of the court below should be affirmed for the reason that under the uniform rule prescribed by a long line of decisions by this court, It is strictly the province of the jury to decide the facts under proper instructions from the court, and that province will not be interferred with in any way by the court; and especially where the verdict is in accord with the overwhelming weight of the testimony.

Wherefore we respectfully but confidently ask that the judgment of the court below be affirmed.

AUTHORITIES CITED.

Vol. 16 A. & E. Enc. of Law, pp. 516, 518, and authorities cited in notes; Clay v. Clay, 3 Met., 548; Keith v. Amende, 1 Bush, 455; Query v. White, 1 Bibb, 271; vol. 2 Ky. Digest, sec. 277, under head of evidence, p. 3191.

OPINION OF THE COURT BY JUDGE HOBSON.—Reversing.

In December, 1904, A. Mussellam delivered to the Southern Railway Company at Knoxville, Tenn., some boxes of oriental goods, to be shipped to himself at Danville, Ky. The railway company gave him a bill of lading for seven boxes, weighing 1,065 pounds. When the goods were delivered to him at Danville, there were only six boxes. The weight of these six boxes is not shown. The goods were carried by the Southern Railway from Knoxville to Harriman, and then delivered to the Cincinnati, New Orleans & Texas Pacific Railway, which took them to Lexington, and from Lexington they were shipped back to Danville. They did not reach Danville until January 10th.

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He brought this suit against both railways to recover for the loss of the seventh box, the contents of which he valued at something over $1,800. The defense to the action was in effect that only six boxes were in fact delivered at Knoxville to the Southern Railway. On the first trial of the case, the jury found for him, fixing the damages at $900. The court granted a new trial. On the second trial, the court gave a peremptory instruction to the jury on all the evidence to find for the Cincinnati, New Orleans & Texas Pacific Railway Company, and, the case being submitted as to the Southern Railway Company, the jury returned a verdict in its favor. Judgment was entered on the verdict, and the plaintiff appeals.

Mussellam, for a week before the shipping of the goods, had been selling at auction at Knoxville goods which he had brought there from St. Louis. The proof for the defendant showed that he did not have at Knoxville the goods which he charged were in the box that was lost. It also showed that these goods could not have been put into such a box, that, after the auction was over, what goods he had left unsold were packed into seven boxes, which were hauled by the transfer wagon to the station. The driver of the wagon said that, when he reached the station, only six boxes were taken out of the wagon; Mussellam telling him that he would take the other box with his trunk as baggage. The agent who checked the boxes said there were only six, weighing 1,065 pounds; that he placed them in a Lexington car and sealed the car with the Knoxville seal. The agent at Lexington testified that, when the car reached him, the seal was unbroken; that he opened the car, and there were only six boxes in it, which he then had placed in the freight depot, and afterward reshipped to Danville. On the other

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hand, Mussellam testified that this box was not opened at Knoxville, that it was delivered with the other six to the railway company, and that it contained the articles sued for, which the Knoxville witnesses knew nothing about. He not only received a bill of lading at Knoxville for seven boxes, but the waybill which went with the car called for seven boxes. The Cincinnati New Orleans & Texas Pacific Railway receipted to the Southern Railway for seven boxes, and sent a similar waybill to Danville. The agent at Danville receipted for the freight on seven boxes, weighing 1,065 pounds, "one box missing."

1. The rule is settled that a receipt is not conclusive between the parties, but is only prima facie evidence of what was received. The receipt given by the railway companies for the freight specifying that there were seven boxes created a presumption that they received in fact seven boxes, and the burden of proof is on them to show that only six boxes were in fact received. They may show what was received, but, unless they show to the contrary, the plaintiff is entitled to recover upon his receipt. The instructions which the court gave the jury do not conform to this rule. The court under our practice should not tell the jury that the burden of proof is upon one of the parties, or that the presumption of law is against him; but the instructions should be so framed as to indicate the burden of proof without especially referring to it. Under the instructions of the court, the jury were directed to find for the plaintiff if they believed from the evidence that he had delivered the box to the Southern Railway. This placed the burden of proof on him of showing that he had delivered the box, while the receipt made out a prima facie case for him. The court should have instructed the jury that they

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should find for the plaintiff against the Southern Railway Company, unless they believed from the evidence that the plaintiff had not delivered the box to it; and that they should find for him against the Cincinnati, New Orleans & Texas Pacific Railway Company, unless they believed from the evidence that the Southern Railway Company had not delivered the box to the Cincinnati, New Orleans & Texas Pacific Railway.

2. The court should not have instructed the jury peremptorily to find for the Cincinnati, New Orleans & Texas Pacific Railway Company. It had in writing receipted for seven boxes. It had in writing acknowledged that one box was missing. While these writings were not conclusive upon it, they made out a prima facie case, and the credibility of the testimony explaining them away was for the jury. The agent at Lexington received no waybill for these goods. The agent at Danville seems to have received two waybills which did not agree. The delay in getting the goods from Lexington to Danville is not fully explained. It is the province of the jury to determine from all the evidence whether the box was delivered to the Southern Railway at Knoxville, and, if it was, whether it was lost there or after the car reached the Cincinnati, New Orleans & Texas Pacific Railway Company.

3. The plaintiff offered to read in evidence the writing given him at Danville, and to prove that the agent there told him that one box was missing, and that it would be along in a few days. The agent was the representative of the railway company to deliver the freight, and what he said in delivering it, or as an excuse for not delivering it, is competent against the company. The weight of the evidence is for the jury. It should not have been excluded by the court. The plaintiff should also be allowed to read to the jury the

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bill of lading received by him at Knoxville and the waybills which went with the freight. The writings are written documents made by the defendants, and are competent against them. While they are not conclusive, the credibility of the evidence explaining them on behalf of the defendants is for the jury. When a paper is shown to be in the possession of the defendant, the plaintiff should, before the trial begins, notify the defendant to produce it on the trial, or procure a rule for the production of the paper. If the paper is not then produced, or is shown to be lost, secondary evidence of its contents may be given. In this case there was no notice before the trial for the production of the papers, and no rule, so the court did not err in refusing to require the production of the papers by the defendant.

4. The plaintiff testified that the articles in the box were rugs of certain sorts and dimensions, of good quality and of certain value. He then introduced two witnesses who had dealt in such rugs, and testified they knew their value, and proposed to prove by them that rugs of the size and sort described by plaintiff of good quality were of the value claimed. The evidence was rejected, on the ground that the witnesses had not seen the rugs and did not know their quality. The dimensions, description, and quality of the rugs being shown, it still remained to show their value. One witness may show the dimensions of the rugs, another their quality, a third their description, and a fourth, who is an expert, may testify what the things thus described are worth in the market. Expert testimony is not confined to opinions as to what the witness has seen, but is oftener given as to matters described to the witness. If expert testimony as to the value of lost articles were confined to persons who had seen

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them, the jury might be often misled, for the persons who have seen them may be much mistaken as to their value, although entirely accurate as to what the things are. The evidence here offered, while not of great weight as the case stood, should have been admitted, as it served to establish a material fact in the case. The plaintiff should also have been allowed to prove that the goods he claimed could be packed in a box of the size of the one in controversy. The defendants had given evidence that the goods could not be put in such a box, and he should have been allowed to prove by himself and two other witnesses that he had packed in their presence goods of the same description and amount as those in controversy in a similar box.

5. The testimony of George Alexander and wife was properly rejected. They only testified to seeing the plaintiff at the St. Louis fair in possession of oriental goods similar to those said to be in the box, but they do not show that he then owned the goods. On the contrary, their evidence shows he was only a salesman selling the goods for another person. The law requires the best evidence, and the mere fact that he was in possession of such goods at St. Louis proves nothing material to the case.

6. Mussellam should have been allowed, while testifying in chief, to state where he had lived, and what business he had followed, so as to give the jury a better idea of who the witness was, and what weight should be attached to the opinion evidence which he gave. He should also have been allowed, while on the stand in rebuttal, to tell what took place between him and the driver when the goods were taken to the station, in so far as the driver had testified to any statements then made by him. He offered to testify that he did not tell the driver to leave one of the boxes

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in the wagon, and, as the driver had testified to this for the defendant, he should have been allowed to testify that he did not make the statement attributed to him by the driver.

7. The defendants should be allowed to prove that, when a car was shipped through, the waybill to Harriman was made out from the waybill which accompanies the car, and not from an inspection of the contents of the car where the car was sealed. This evidence would serve to explain how it was that the Cincinnati, New Orleans & Texas Pacific Railway receipted for seven boxes. In the same manner, proof was properly allowed as to how and under what circumstances the receipt for seven boxes was made out at Knoxville.

8. The weight of the evidence sustains the verdict of the jury in favor of the defendant; but, in view of the whole record, we conclude that the plaintiff did not have a fair trial before the jury on the merits of his case, and that, as he is entitled to a jury trial and a fair trial, a new trial should be awarded. We see no reason for disturbing the action of the circuit court in granting a new trial after the first trial of the case. Circuit courts have a wide discretion as to new trials, and much greater effect is given to the order of the circuit court granting a new trial than to one refusing a new trial, for the reason that he is upon the ground, and that, when he concludes that the ends of justice require a new trial, this court will not interfere with his discretion, unless it is palpably abused.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

Petition for rehearing by appellee overruled.

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CASE 57.—ACTION BY S. B. & C. C. SPAULDING AGAINST A. J. GRUNDY TO RECOVER ONE-HALF THE VALUE OF A PARTY WALL.—September 27.

Spaulding, etc , v. Grundy

Appeal from Marion Circuit Court.

I. H. THURMAN, Circuit Judge.

From a judgment sustaining a demurrer to plaintiffs' petition they appeal—Reversed.

Party Walls—Liability of Adjoining Owner for Use.—A person who uses a wall erected on the dividing line by the owner of an adjacent lot, should pay a reasonable and fair price for the use thereof estimated as of the time the user takes place, even though neither he nor his vendor was a party to the erection of the wall, and made no agreement, express or implied, concerning it.

H. W. RIVES, attorney for appellants.

The builder of a wall owned it all and could have removed it, or his vendees could have removed it, without question as to their right to do so, at any time before it was actually used by appellee Grundy. Appellee builds to it. He thus appropriates to himself, not only that part of the wall standing on his own ground, but deprives appellants of what had been their undoubted right to move that portion of the wall which rests upon their own ground. By the appropriation of the one-half on his side, appellee has imposed upon appellants the burden of maintaining the half that is on their side intact for his benefit. No part of the wall, not even that portion resting on his side of the line, was his property, merely from the fact that it had been constructed by appellants' vendors without contract with appellee, or appellee's vendors. The very fact that they would have had a right to remove it at any time before appellee used it, or paid for it, is conclusive of the fact that the title was in them. After appellee's appropriation of it to his own use, and his imposition of the

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easement upon that portion resting on appellants' land, he refuses to contribute to the cost, he refuses to pay any part of the present value of that which he takes. The case is not one based upon a covenant between parties, unless it be upon such implied covenant as even a court of law, and with much stronger reason, a court of equity will declare created by the circumstances. Appellants clearly had the right to require contribution from appellee to the extent of the full present value of one-half the wall, which he has now appropriated to his own use.

AUTHORITIES CITED.

Harber v. Evans, 101 Mo. 661, 20 Am. St. Rep. 646; Dorsey v. Habersack, 84 Md. 117; Henry v. Koch, 80 Ky. 391; Oldstein v. Fireman's Bldg. Ass'n, 44 La. Ann. 492; Whiting v. Gaylord, 66 Conn. 337, 50 Am. St. Rep. 87; List v. Hawnbrook, 2 W. Va. 340; Cole v. Hughes, 13 Am. Rep. 611, 54 N. Y. 444; Kimm v. Griffin, 67 Minn. 25, 64 Am. St. Rep. 385; Roche v. Ullman, 104 Ill. 111; Harris v. Dozier, 72 Ill. App. 542; Mickel v. York, 175 Ill. 62; McChesney v. Davis, 86 Ill. App. 380; Voight v. Wallace, 179 Pa. St. 520; Tomblin v. Fish, 18 Ill. App. 439; Thomson v. Curtis, 28 La. 229; Pew v. Buchanan, 72 Ia. 637; Standish v. Lawrence, 111 Mass. 111; Pilsbury v. Morris, 54 Minn. 492; Jordan v. Kraft, 33 Neb. 845; Hendricks v. Stark, 37 N. Y. 106; Appeal of Heimbach (Pa.), 7 Atl. 737; Arnold v. Chamberlin, 14 Tex. Civ. App. 634; National Fire Ins. Co. v. Lee, 75 Minn. 157; Adams v. Noble, 120 Mich., 545; Mott v. Oppenheimer, 135 N. Y., 313; Keteltas v. Penfold, 4 Ed. Smith, 122; Platt v. Eggleston, 20 Ohio St., 414; Day v. Caton, 119 Mass. 513, 20 Am. Rep. 347; Graves v. Smith, 87 Ala. 450, 13 Am. St. Rep. 60; Ingals v. Plamondon, 75 Ill., 118; Meckle v. York, 66, Ill. Supp. 464; Block v. Isham, 28 Ind., 37; Fidelity Lodge I. O. O. F. v. Bond, 147 Ind., 437; Haufman v. Kuhn, 57 Miss., 746; Chiverick v. R. J. Guning Co., 58 Neb., 29; Brooks v. Curtis, 50 N. Y., 639; Burton v. Moffitt, 3 Or., 29; Richardson v. Tobey, 121 Mass. 457, 23 Am. Rep. 283; Sharpe v. Cheatham, 88 Mo. 498, 57 Am. Rep. 433; Campbell v. Mesier, 4 Johns. Ch. 334, 8 Am. Dec. 570; Sanders v. Martin, 2 Lea. 213, 31 Am. Rep. 598; Williford v. Jerard, 22 Ky. Law Rep. 203; Sharp v. Cheatham, 88 Mo. 498, 57 Am. Rep. 433; First Nat'l Bank v. Security Bank, 61 Minn. 25, 63 N. W. 264.

JOHN McCHORD, Attorney for appellee.

1. There is no allegation in appellants' petition, or any pretense that appellee had any notice whatever, either actual or

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constructive, that appellants' remote vendor who constructed the extended wall, did it at his own cost, or expected appellee's remote vendor to pay for half the cost of it. As stated before, there was no writing evidencing an agreement between the vendors of appellants and appellee in relation to the extended wall.

2. It can not be successfully contended by appellants that their petition, in so far as it seeks to remove the alleged cloud and slander on their lot, is not fatally defective. The allegation of the petition is that appellee claims that the wall in controversy is entirely on his own land. A dispute as to the boundary line does not constitute a cloud upon the title.

AUTHORITIES CITED.

22 Am. & Eng. Encyc. Law, 2d. Ed., 255; Cole v. Hughes, 54 N. Y. 444, 13 Am. R. 611; Fonda v. Parr, 10 Ky. Law Rep. 445; Sherrod v. Cisco, 4 Sand.; Partrige v. Gilbert, 15 N. Y. 601; 2 Washburn an Real Property, 262, 263 and 334; Hurd v. Curtis, 19 Pick. 459; Harsha v. Reid, 45 N. Y. 415; Kipple v. Bailey, 2 Nyd. & K. 517; Smiths leading cases; English and American notes to Spencer's case; Black v. Isham, 16 Am. Law Reg. 8; Weld v. Nichols, 17 Pick. 543.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Appellants are the owners of a lot, with a store building thereon, in the city of Lebanon. Appellee owns the adjoining lot. Both lots were formerly owned by one Ben Spalding, and the parties to this litigation acquired their respective lots by various conveyances. For a consderable time, the buildings on both lots extended back the same distance from Main street; the dividing wall between them being recognized as a joint or partnership wall. Afterwards, appellants' vendors increased the depth of their store building by extending the division wall on the line between the lots, and erected a wall two stories in height above the ground. The extension of the partnership wall between the two buildings was

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made by the appellants' vendors at their own expense, with the expectation, belief, and assurance that, when appellee or his vendors should extend their building and use the wall erected by appellants' vendors for the purpose of building on or to it, they would contribute their share of the expense of erecting, it, or pay to appellants one-half of the value of the wall so taken and used at the time it should be used. Appellee acquired title to his lot in 1881, and since then at various times he has extended the store building on his lot, until the storeroom now, reaches to the end of the wall erected by appellants' vendors, and is using and utilizing the wall as the eastern wall of his building. Appellee refusing to contribute anything to the expense of erecting the wall made by appellants' vendors, or pay any part of the value of the wall used by him, they brought this action, seeking to recover from appellee one-half the value of the wall erected by their vendors and used by him. To their petition a demurrer was sustained, and judgment entered dismissing it.

The statement of the facts heretofore made is taken from the petition, and for the purposes of this appeal must be accepted as true. There was no written or other agreement between any of the parties concerning the erection or use of this partition wall, so that the question to be decided may be thus stated: Will a person, who uses for his own convenience and benefit an adjoining wall erected by another person, be required to contribute to the vendee of the person erecting the wall one-half, or his fair proportion of the cost thereof? The center of the wall erected by appellants' vendors was the dividing line between their lot and the adjoining lot, now owned by appellee, and it may be conceded that, at

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any time before appellee took possession of the wall or commenced to use it as a party or partnership wall, it might have been removed by the persons who erected it or their vendees. Appellants, under the conveyances, became entitled to all the rights in the wall that their vendors had; in other words, their status was the same as if the wall had been erected by them. So that the question, when narrowed down, resolves itself into this: If A. erects a wall, the center line of which is the dividing line between his property and that of B.'s, and afterwards B. uses the wall without any agreement or arrangement, written or otherwise, to contribute to the expense of erecting the wall, will the mere fact that B. is using it as one of the walls of the building erected by him entitle A. to recover from B. his proportionate cost of the wall?

When appellee built up to this wall, and used it as one of the exterior walls of his building, appropriating to himself the use of the wall, and enjoying the benefits of the labor and money expended by the persons who erected it, it would seem fair and just that he should be required to contribute toward the cost thereof. Numerous questions concerning party walls have come before the courts, and in many material particulars there is wide conflict and difference in the opinions concerning the rights and liabilities of the persons who erected the walls and those who use them. Generally, party walls are erected under an agreement as to their use, and in many states are regulated by statute, and often an issue has arisen as to whether these agreements are personal to the parties or covenants running with the land and enforcible by and against remote vendees of the persons who made the agreement at the time

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the wall was built. There was no privity of contract respecting this wall between appellants and appellee; nor can it fairly be said that appellee had any connection with the "expectation, assurance, and belief" existing in the mind of appellants' remote vendor when he erected this wall. But, back of this, there stands out in support of appellants' claim the substantial fact that appellee has appropriated to his own use a part of this party wall erected by appellants' vendors, without having paid anything therefor. So that, aside from any of the distinctions that involve the law of party walls in obscurity and doubt, there remains the proposition strongly put in behalf of appellants that justice and fair dealing demand that appellee should contribute towards the payment of a wall that he has used to his advantage and benefit. Indeed, it might with propriety be said that the question here involved partakes more of the nature of a suit for contribution than one involving the doctrine of party walls. Placing the case upon this ground simplifies very much the question to be disposed of. We need not inquire into the law concerning covenants running with the land, as it bears upon the question of party walls; nor is it necessary to attempt to reconcile the conflicting decisions touching the rights of remote vendees in respect to them. There is authority founded in reason and justice that requires a person who uses a party wall, in the absence of any agreement or contract, to contribute his fair proportion of the cost thereof to the person erecting the wall, or, to put it in another and perhaps a better way, to pay a reasonable price for the use of the wall.

One of the earliest cases in support of this doctrine is Campbell v. Meiser, 4 Johns. Ch. 335, 8 Am. Dec.

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570, where Chancellor Kent, writing held that where one owner rebuilt a party wall that was used by the adjacent owner, the latter might be required to contribute to the expense of its erection, saying. "I have not found any adjudged case in point, but it appears to me that this case falls within the reasonable and equitable doctrine of contribution, which exists in the common law, and is bottomed and fixed on general principles of justice." Looking in the same direction is Day v. Caton, 119 Mass. 513, 20 Am. Rep. 347, where the court held that, although a promise to pay for a party wall would not be implied from the fact that the builder, with the knowledge of the adjacent owner, erected the wall, yet such promise might be inferred from the fact that the person erecting the wall undertook and completed it with the expectation that the adjacent owner would pay for it. In Sanders v. Martin, 2 Lea (Tenn.) 213, 31 Am. Rep. 598, the facts were very similar to those here presented. Sanders and Martin owned adjoining lots in the city of Memphis, separated by a party wall. The houses were two stories high without any cellar. Sanders erected a three-story brick house on his lot, and used the party wall, raising it one story higher. He also, with the consent of Martin, made a cellar, which necessitated underpinning the party wall by a wall of the same thickness, one half on his lot and the other half on the lot of Martin. Sanders expected that, when Martin came to use the cellar and raise his house higher, he would contribute one-half the actual cost of these improvements. Afterwards Martin erected a building on his lot, using in its construction the wall erected by Sanders. Thereupon Sanders brought an action for contribution against Martin. In the opinion, the court said:

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"The common law is singularly obscure on this subject, and the decisions few, conflicting, and unsatisfactory. It seems certain that the common law does not recognize the right of the owner of land to compel the owner of an adjoining lot to build a party wall; nor can either demand contribution from the other for a wall erected in whole or in part on the land of such other person, nor for any incidental benefit the latter may derive from a wall erected entirely on the land of the builder. The authorities stop short of the case before us, and that is, whether, after the wall has been underpinned and raised in height by one for his own convenience, he can claim contribution from the co-owner when the latter actually uses these additions. In the forum of conscience the answer would at once be that the latter ought to pay the former for the benefit received by his labor and expenditure. The argument of the learned counsel for the defendants is that this court is governed by the law, not by principles of abstract right; that the defendant Martin is not entitled to treat any erection made by a third party on his own land as his own; and, in fine, that the client stands upon the letter of the law, and claims all he can get. If one owner can rebuild a party wall, which has become dangerous, and compel contribution, it is clearly upon the equitable and moral principle that the expenditure is for the benefit of both, and that the right of easement is a sufficient basis upon which to justify interference and raise an implied contract. The same basis exists where a wall is added to and actually used. If both of these parties had dug their cellars and added additional stories to their houses at the same time, although only one of them built the addition to the party wall, a promise by the other to pay for the moiety of the

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wall would be implied. Is there any reason in law why the same implied promise would not arise where, after the addition had been made by one, the wall was used by the other? The relation of the parties created by the joint easement in the new wall would seem to be as efficient in the case of an addition to the wall as in the case of rebuilding the same wall. Upon the case made in the bill, if established by the testimony, the complainant is entitled to relief. The measure of relief, however, is not the cost of the additions to the wall, but the moiety of the value of the additions at the time they were actually used by the defendants. They might never have been used, in which case no contribution whatever could be had. They might have been erected when the work for some reason exceptionally costly, and used when the wall could have been done at half price, or when the wall itself had become dilipidated by time. Martin cannot be called upon to pay more than half the value of the wall when used." In Willford v. Gerhard, 22 Ky. Law Rep. 203, 56 S. W. 416, the court quoted with approval Campbell v. Mesier, and Sanders v. Martin, and upheld the doctrine of contribution in cases of party walls.

The conclusion we have reached is not free from doubt, and is contrary to the views held by a respectable number of courts; but we are of the opinion that a person who uses a wall erected on the dividing line by the owner of the adjacent lot should pay a reasonable and fair price for the use thereof, estimated as of the time when the user takes place. And this, although neither he nor his vendor was a party to the erection of the wall, and made no agreement, express or implied, concerning it.

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The judgment is reversed, with directions to proceed in conformity with this opinion.

CASE 58.—ACTION BY PETER EICHMAN'S COMMITTEE AGAINST THE SOUTH COVINGTON & CINCINNATI STREET RY. CO.—Sept. 27.

Eichman's Committee v. South Cov. & Cin. Street Ry. Co.

Appeal from Kenton Circuit Court.

W. McD SHAW, Circuit Judge.

Judgment for defendant, plaintiff appeals.—Affirmed.

1. Jury—Impaneling.—Ky. Stats., 1903, Secs. 2241-2244, relate to the selection and impaneling of juries, and were re-enacted by Sess. Acts, 1906, p. 519, c. 156, with certain alterations, which made service on a regular jury within a year previous a new ground of challenge, and provided for a drawing in open court by the judge of the names of jurors from the jury wheel. Held, that the amendment, which went into effect June 11, 1906, did not annul the selection of existing juries drawn under the statute before amendment, though such parts of the amended statute as required no further time to put them into operation, such as the right to challenge a juror on the ground that he had served on a regular panel within a year previous, became fully effective on June 11, 1906.
2. Same—Challenges to Panel—Practice.—Challenges to the panel should precede poll challenges.
3. Same—Objections—Waiver.—Unless seasonably made, objections to the panel, as well as to the polls, are deemed waived.

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BYRNE & READ and ROBERT C. SIMMONS, attorneys for appellant.

Legislatures, in passing acts regulating procedure, wherein provisions of other acts constituting substantial advantages, are taken away, sometimes provide by saving clause that incomplete or unfinished proceedings shall not be affected by such repeal. In the absence of a saving clause, however, such rights or advantages are taken away and lost. In the case at bar an improvement in the law is made; a right is granted, not taken away, and it is sought to withhold this right from the litigant after the law goes into effect, by requiring him to go through the mockery of a trial under a dead law. The only excuse presented for this post mortem vitilization of a statute, which had been tossed on the legislative scrap heap, is that in the interest of a speedy trial, the court ought to deny a legal jury to a litigant by reading into the law a saving clause omitted by the legislature. The absurdity of this position is apparent when the necessity of frequent postponements of trials is called to mind. If either side in this cause had presented sufficient grounds for a continuance because of the absence of material witnesses, a postponement for weeks, or possibly for months, would hardly have been considered a grievous hardship, much less an injustice by the opposing side. Such trifling inconvenience cannot be urged as a reason for ignoring the plain provision of a statute conferring a vital right.

AUTHORITIES CITED.

Sutherland Stat. Cons., Sec. 225; Sutherland Stat. Cons., Sec. 111; Cov. & Cin. Bridge Co. v. Smith, 25 Ky. Law Rep. 2292; S. Cov. & Cin. St. Rwy. Co. v. Schilling, 26 Ky. Law Rep. 1; Curtis v. Commonwealth, 22 Ky. Law Rep. 267; State ex. rel. Maurice v. Judge Superior District Court, 30 La. Ann. 603; State v. Bradley, 48 Conn. 535; Thompson, Trials, Sec. 37; Powell v. People, 5 Hun. 169.

ERNST, CASSETT & McDOUGALL and T. H. PAYNTER, attorneys for appellee.

CLASSIFICATION.

1. The panel from which the jury in this case was selected was lawfully drawn and acting at the time of the trial, and the jury was properly selected therefrom. Stone, Auditor, v. Saunders, 106 Ky., 904; Decision of Judge Field; Section 985, Kentucky Statutes; Sinking Fund Commissioners v. George, 104 Ky., 260.

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2. The objection to the entire panel was made too late. Thompson on Trials, Sec. 91; Bridge Co. v. Smith, 25 Ky. Law Rep., 2292; Street Railway Co. v. Schilling, 26 Ky. Law Rep., 1; Curtis v. Commonwealth, 23 Ky. Law Rep. 267.

ADDITIONAL AUTHORITIES.

Cyc. Law and Procedure, vol. 24, pp. 311, 324, 330; Ency. Pleading and Practice, vol. 12, pp. 418, 424; Mueller v. Rebham, 94 Ill., 146.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

An amendment to sections 2241, 2242, 2243, and 2244, Ky. St. 1903, was adopted at the 1906 session of the Legislature without an emergency clause (chapter 156, p. 519, Sess. Acts 1906), and therefore went into effect 90 days after the adjournment of the session (section 51, Const.), or on June 11, 1906. Sections 2241-2244, Ky. St. 1903, are parts of the laws of the State regulating the selection and impaneling of juries. The amendment re-enacted those sections with certain alterations. The only changes that affect this case are those pertaining to the venire for the term, or in courts of continuous session, for the specified parts of terms, and the grounds for challenge. The Kenton circuit court was in session on and prior to June 11, 1906, on which latter date this case had been set down for trial. Though called then, its trial was not begun till the following day, when, the parties announcing ready, a panel of 18 jurors who had been previously selected and summoned as part of the standing and regular jury for the term, under the existing statute, came around for examination. Being questioned, two were excused upon the challenge of the plaintiff (appellant) upon the ground that they had served upon a regular jury

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within a year previous—a new ground of challenge made by the amendment. The panel was filled and found qualified and offered to the parties that they might exercise their peremptory challenges. Thereupon appellant for the first time interposed an objection to the entire panel upon the ground that it had not been selected in accordance with the provisions of the act of 1906. His objection and challenge to the panel was overruled, and he excepted. Not being satisfied with the verdict and judgment, he prosecutes this appeal from the judgment overruling his motion for new trial, and asks a reversal upon the sole ground that the trial court erred in overruling his challenge to the panel. His contention is that the act of 1906 became the law on June 11, 1906, repealing the sections amended by it, and annulled the selection of all existing juries which had been drawn under the statute before the amendment.

The fact is the amendment re-enacted the sections of the statute, providing as new matter for a drawing in open court by the judge of the names of jurors from the jury wheel, and giving a new cause for challenging a juror. The law regulating the selection of juries was not altered in other respects in material degree. Nor do the amended sections show a legislative purpose to suspend for any time the trial by jury in courts in session when the amendment became a law, until the amended sections could be put into practical effect. Some time must necessarily elapse under the terms of the amendment before it could become effective. In the meantime, the juries already selected might be used by the courts. Such parts of the amended statute as required no further time to put them into operation, as, for example, the right to challenge a juror on the ground that he had served

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upon a regular panel within a year previous, became fully effective on June 11, 1906.

We will add, lest a failure to do so might be misconstrued into approval of the practice, that the objection to the panel came too late, in any event. Challenges to the panel should precede poll challenges. Unless seasonably made, the objections to the panel, as well as to the polls, are deemed to have been waived.

Judgment affirmed.

CASE 59.—PROSECUTION AGAINST GEORGE WALTON FOR A VIOLATION OF THE REVENUE LAW IN RUNNING A HACK LINE WIHTOUT A LICENSE.—September 27.

Commonwealth v. Walton

Appeal from Barren Circuit Court.

SAMUEL E. JONES, Circuit Judge.

Defendant acquitted and Commonwealth appeals.—Affirmed.

Licenses—Hack Lines—What Constitutes.—That defendant's hacks or other similar vehicles regularly met railway trains at a station, and for hire transported passengers in that town, was not the operation of a hack line, within the revenue law of March 15, 1906 (Acts 1906, p. 200), requiring the payment of a license to run a hack line.

N. B. HAYS, Attorney General; C. H. MORRIS and D. A. McCandless for appellant.

BAIRD & RICHARDSON for appellee.

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OPINION OF THE COURT BY JUDGE BARKER—Affirming.

This is a prosecution against George Walton to collect a fine for violating that provision of the revenue law, approved March 15, 1906, which requires the payment of a license to run a hack line. The language of the statute is as follows: "On each regular hack, stage or automobile line for public use, operated for not less than one month, and where a fare is charged and collected, ten dollars." Acts 1906, p. 200. The case was tried in the circuit court on an agreed statement of facts, which shows that the appellee was in the livery business in Glasgow, Ky., and that he owned hacks and other public conveyances which he let out for hire. These hacks, or other vehicles of a similar kind, regularly met the railroad trains bringing passengers to Glasgow; it being usual for the hacks to be at the depot, which is some distance from the main part of the town, wait until the trains come in, and then for hire transport passengers to such parts of the city as they desired to go. This business had been carried on by the appellee for more than one month prior to the institution of this prosecution.

The question is whether this business constitutes the operation of a hack line within the meaning of the statute. The trial court held that it was not, and dismissed the warrant against the appellee. In this judgment, we concur. The statute is not aimed at the operation of hacks, stages, or automobiles within a municipality. To go to the depot in search of customers is no more operating a hack line than to go to a regular hack stand and there wait customers. It

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seems to us that the word "line," in the connection in which it is used in the statute, has a significance different from that sought to be given it here. "Stage line," "railroad line," and "automobile line" are expressions which are ordinarily understood to mean a regular line of vehicles for public use operated between distant points, or between different cities, and do not include hacks, stages, and automobiles which merely operate from point to point in one city for the transportation of the public. We have been cited to no authority upholding the contention of the Commonwealth in this case. The learned judge of the circuit court was of opinion, as said before, that the business described above did not constitute a hack line within the meaning of the statute, and in this we concur.

Judgment affirmed.

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CASE 60.—ACTION BY JAMES P. KING AGAINST THE CITY OF MT. STERLING TO TEST THE VALIDITY OF AN ORDINANCE LICENSING THE SALE OF LIQUORS.—October 1.

City of Mt. Sterling v. King

Appeal from Montgomery Circuit Court.

A. W. YOUNG, Circuit Judge.

Judgment for plaintiff, defendant appeals.—Reversed.

1. Intoxicating Liquors—License Tax—Ordinances.—An ordinance fixing a license tax for the sale of intoxicants is not invalid for failing to specify the purpose for which the tax is levied.
2. Municipal Corporations — Council — Special Meetings — Ordinances.—Since, except in legislation involving contract rights, legislative bodies are independent of their predecessors, and may amend or repeal existing laws at pleasure, and since Ky. Stats., 1903, sec. 3502, authorizes special meetings of councils in fourth-class cities, and councils may do anything at special meetings they may do at regular meetings, an ordinance of such a city, providing no ordinance or by-law shall be amended except at a regular meeting, is invalid.

D. L. DAY and R. A. CHILES for appellant.

Our contention is:

First. That a legislative body cannot control the subsequent acts of the same body.

Second. That section 158 of the city ordinances was repealed, at least by implication, by the passage of this ordinance on December 26th, 1907.

Third. That it was original legislation.

Fourth. That chapter 81, section 2, of the Acts of the Legislature of 1906, did not apply to the issual of liquor licenses.

Fifth. That sections 180 and 181 of the Constitution were and did not apply to the issual of saloon licenses, and therefore the Constitution was not violated nor was chapter 81, section 2, of the

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Acts of 1906 applicable to said saloon license. That under the Constitution, sections 180 and 181, the question of saloon license was left to the legislature to regulate and by law to confer the proper authority on the respective municipal legislative bodies to regulate and restrain the same.

Sixth. That the payment of said license by the appellee, King, was voluntary.

AUTHORITIES CITED.

Subsections 1, 27 and 35 of sec. 3490, Ky. Stats., and sec. 3502; Gorham v. Luckett, 6 B. M., 154; Mann v. Frame, 5 Dana, 535; 2d Ed. Sutherland on Statutory Const., secs. 269, 270, 271 and 247; Broaddus v. Broaddus, 10 Bush, 299; Parrish v. Ferguson, 83 Ky., 18; Patterson v. Commonwealth, 86 Ky., 313; Buchanan v. Commonwealth, 95 Ky., 334; Long, Treasurer, v. Stone, Auditor, 19 Ky. Law Rep. 246; United States v. James Tynen, 11 Wallace, 88; Maddox et al. v. Graham, 2d Met., 56; Rash v. Holloway, 82 Ky., 674; secs. 180 and 181 present Constitution; Levi v. City of Lou., 97 Ky., 394; Childers v. People, 11 Mich., 43; People v. Jarvis, 46 N. Y. Supp., 496; Wiggins Ferry Co. v. City East St. Louis, 102 Ill., 560; Black on Intoxicating Liquors, 117; Cooley on Constitutional Limitations, 6th Ed., pp. 242 and 718; 2d Ed. Am. & Eng. Encyc. Law, p. 209; Tenny v. Lenz, 16 Wis., 566; Tim v. Hamm, 109 Ill., 593; Tyler v. Smith, 18 B. M.,632; Melton v. City of Maysville, 19 Ky. Law Rep. 1033; 18 U. S. Law Ed., 614; Dodge v. Union Pac. R. R., 98 U. S.; 48 U. S. L. Ed. 432; Granger's Mut. B. Ass'n v. McGregor, 7 Ky. Law Rep. 757; Brands v. City of Lou., 111 Ky., 56.

W. B. WHITE, attorney for appellee.

POINTS AND AUTHORITIES.

1. The ordinance fixing the license fee for retailing liquors at $600 per year is invalid because it was adopted at a special meeting of the council of appellant city. Section 3486, Ky. Stats.; sec. 158, ordinances and by-laws, city of Mt. Sterling; Shugars v. Hamilton, 92 S. W. 564; Town of Springfield v. Bank, 63 S. W. 271, 23 Ky. Law Rep. 519.

2. The ordinance fixing the license fee for retailing liquors at $600 per annum is invalid because it does not specify the purpose for which same is levied and the purpose for which the revenue derived therefrom shall be expended. Chapter 81, Acts General Assembly, 1906; Levi v. City of Louisville, 97 Ky., 406; Shugars v. Hamilton, 92 S. W., 564.

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3. Appellee having paid the license fee under the belief that it was lawfully imposed is entitled to recover the excess imposed by the invalid ordinance. Harrodsburg, etc., v. Renfro, etc., 22 Ky. Law Rep., 806; Bruner v. Town of Stanton, 102 Ky., 459.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Previous to the 26th day of December, 1906, the license tax to sell spirituous, vinous, and malt liquors in quantities of less than a quart in the city of Mt. Sterling had been fixed by ordinance at the sum of $500 per annum. On this date a special meeting of the board of council was regularly held, having been called in the manner provided by Ky. St. section 3502; and at this meeting an ordinance was adopted fixing the license tax at $600, and repealing all ordinances in conflict therewith. After the passage of this ordinance, appellee applied for and was granted a license to retail spirituous, vinous, and malt liquors upon condition that he pay the license tax of $600. To procure said license he paid the tax exacted, and thereafter brought this action to recover from the city $100, upon the ground that the ordinance raising the tax from $500 to $600 was void, and that the city authorities had no right to exact from him in payment of the license more than $500. The ordinance was assailed upon two grounds: First, because prior to December, 1906, the city council had by ordinance provided when regular meetings of the council should be held, and had furthermore enacted that no ordinance or by-law should be altered or amended except at a regular meeting of the council, and the ordinance in question having been adopted at a special meeting was invalid; second, because the ordinance failed to

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specify the purpose for which the license tax imposed was levied.

If the city authorities required appellee to pay more for the license than they were authorized to demand, he had the right to maintain an action against the city to recover the excess. Board of Council of Harrodsburg v. Renfro, 58 S. W. 795, 22 Ky. Law Rep 806, 51 L. R. A. 897; Bruner v. Town of Stanton, 102 Ky. 459, 43 S. W. 411, 19 Ky. Law Rep. 1514. But, in our opinion, the ordinance fixing the license tax at $600 was valid. The second objection above stated to its validity is not well taken as has been expressly decided in Brown-Foreman Co. v. Com., 125 Ky. 402, 101 S. W. 321, 30 Ky. Law Rep. 793. Under section 3490, subsection 27, Ky. St. 1903, the council in cities of the fourth class had the power to fix the license tax for retailing liquors in any amount not less than $250, nor more than $1,000 So that the only question to be determined is: Did the council have the right to enact the ordinance fixing the tax at $600 at a special session?

Section 3502, Ky. St. 1903, authorizes the mayor to call special sessions of the board of council whenever in his judgment it may be necessary, and at special sessions the council has the right to enact any ordinance within the powers of the council. There is no provision in the act for the government of cities of the fourth class prescribing the character of ordinances that may be enacted at special meetings of the council; and hence whatever the council may do at a regular session it may do at a special one. The question at issue, then, narrows down to the proposition whether or not the enactment by the council previous to December, 1906, that no ordinance or by-law should be amended except at a regular meet-

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ing of the council, prohibited a subsequent council from repealing or amending at a special session ordinances previously enacted. In other words, the proposition presented by counsel for appellee is that one council is bound by the legislation of a prior one, and cannot act except as it has directed. As we have seen, there was no statute prohibiting the enactment of the ordinance in December, 1906, and we are of the opinion that the attempt of a former council to prescribe the manner in which its successors should repeal or amend existing ordinances was entirely unavailing. In business so important as State legislation, one Legislature cannot put any limitation in the matter of ordinary legislation upon its successor, control its conduct. or prescribe its method of procedure in the enactment of laws. If legislation could thus be controlled, the power, independence, and freedom of legislative bodies would gradually become so limited as that each succeeding Legislature would have less liberty than its predecessor, and ultimately the legislative branch of the government would become a useless appendage on the body politic. But, except in legislation involving contract rights, each Legislature is entirely independent of its predecessor, and is vested with complete authority to amend or repeal existing laws at its pleasure. Cooley's Constitutional Limitations, p. 172; Swift v. City of Newport, 7 Bush, 37. And these reasons apply to legislative boards in municipal corporations. In the absence of a statute controlling it, we know of no reason why one council should find its hands tied by the action of its predecessor, or why one council should have more power than another, or the right to make laws that could not be subsequently amended or repealed in the

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manner provided in the act creating the municipality. Each council, except as restrained by the charter provisions, has the same powers as its predecessors—the right to make laws and to repeal them, subject, of course, to the rights that have arisen under valid contracts entered into; and this, without reference to what its predecessor may have done or attempted to do.

The city council of Mt. Sterling under the provisions of the charter had the power to fix the license tax for retailing liquors at any sum not less than $250 nor more than $1,000, and when the license tax had been fixed by the council, the same council at a subsequent meeting, or its successor, might within the limits above named raise or lower the tax so as to bind persons applying for license after the change had been made. The ordinance fixing the tax at $600 repealed the ordinance fixing it at $500; and, as appellee applied for and obtained his license when the ordinance fixing the tax at $600 was in effect, he was rightfully required to pay the sum named.

Wherefore the judgment is reversed, with directions to dismiss appellee's petition.

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CASE 61.—ACTION BY THE LOUISVILLE GUNNING SYSTEM AGAINST THOMAS F. PARKS FOR DAMAGES FOR PAINTING OUT A SIGN.—October 1.

Louisville Gunning System v. Parks

Appeal from Jefferson Circuit Court.

C. P. Branch (2 Div.) THOS. R. GORDON, Judge.

Judgment for defendant, plaintiff appeals.—Affirmed.

Landlord and Tenant—Lease of Wall by Tenant for Advertising Purpose—Necessity for Landlord's Consent.—Under Ky. Stats., 1903, section 2292, providing that, unless the landlord consents in writing, a transfer by a tenant for a term less than two years of any interest in the premises shall forfeit the lease, a lease by such a tenant of a wall for advertising purposes, without the landlord's consent, was void as to the landlord; and, the painting of a sign upon the wall by the sublessee being unlawful, the sublessee is liable to the landlord for his damages.

JACOB SOLINGER, attorney for appellant.

1. An action for trespass "quare clausum fregit" cannot be maintained by the landlord where the property is in the lawful possession of a tenant at the time the trespass was committed.

2. A tenancy at will will be regarded as a tenancy from year to year where the premises have been occupied by the tenant for more than a year.

3. Where a landlord for sufficient consideration has parted with the possession and use of his property to a tenant, the tenant is entitled to the use and occupation of the exterior walls as well as the interior walls of the demised premises.

4. The granting by a tenant to a third person of a privilege to use the walls of demised premises for sign purposes does not operate as a forfeiture of the demised premises to the landlord.

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AUTHORITIES.

Ky. Stats., section 2326; Squire v. Huff, 3 Marshall, 17; Irvine v. Scott, 85 Ky., 260; Waldon v. Conn, 84 Ky., 312; Blackstones Commentaries, 3d Book, p. 182; Taylor on Lanlord and Tenant, 4th Ed., p. 118; Aldridge v. Stuyvesant, 1 Halls N. Y. Rep., 214; Landlord and Tenant, vol. 18, Am. & Eng. Encyc. of Law (2d Ed.), p. 450; Ky. Stats., section 2361; Coppage v. Griffith, 19 Ky. Law Rep., 460; Meehan v. Edwards, 92 Ky., 574; Riddle v. Littlefield, 53 N. H., 503; Baldwin v. Morgan, 43 Hun (N. Y.), 355; Wood on Landlord & Tenant, 48; Lowell v. Strahan, 145 Mass., 1; H. J. Gunning Co. v. Cussach, 50 Ill. App., 290; Willouby v. Lawrence, 116 Ill., 11; Goldman v. N. Y. Advertising Co. (N. Y.), 29 Miss. Rep., 133; Ky. Stats., 2292; Reynolds v. Van Buren, 155 N. Y., 120; Sloan on Landlord and Tenant, 48.

JOHN S. JACKMAN, attorney for appellee.

POINTS AND AUTHORITIES.

Landlord and Tenant.—A tenant at will, or by sufferance, or for a term less than two years, cannot lease a wall of the premises to a third person for advertising purposes without the consent of the landlord. Section 2292 Ky. Stats.

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

Thomas E. Parks owned two adjoining lots on Walnut street in the city of Louisville. On each of them was a house which he rented to a tenant. One of the houses extended out to the sidewalk, and was occupied by one Herbert, a tailor, as a tailor shop and residence. The other one set back from the sidewalk 25 feet, and was occupied by one Ramsey, a tenant, as a residence only. The west wall of the Herbert house inclosed on the east the Ramsey yard. The wall was partially covered with vines and flowers. Herbert, without the consent of Parks, leased the wall to the Louisville Gunning System for advertising purposes. It sent its painters, who tore down the

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vines and flowers and painted on the wall a large sign advertising the Starr Dry Goods Company. This advertisement is his front yard was an offense to Ramsey, who complained to Parks. Parks demanded of the Louisville Gunning System that it should paint the sign out. This it refused to do, and he then had it painted out himself. It then instituted this action against him to recover $1,020 in damages for painting out the sign; $20 being for the original cost of painting it. He, by his answer, set up a counterclaim against it for $1,020 in damages for painting the sign on his wall without his consent; $20 being for the cost of painting out the sign. On the trial of the case, the court, in substance, instructed the jury to find for Parks the cost of painting out the sign. The jury found for him in the sum of $15. Judgment was entered on the verdict, and the Louisville Gunning System appeals.

Section 2292, Ky. St. 1903, is as follows: "Unless the landlord consents thereto in writing, every assignment, or transfer of his term or interest in the premises, or any portion thereof, by one who is a tenant at will or by sufferance, or who has a term less than two years, shall operate a forfeiture to the landlord, who after having given the occupant ten days written notice to quit, may re-enter and take possession, or may, by writ of forcible entry or detainer, or the proper procedure, recover possession of the premises from any occupant thereof, whoever he or she may be."

The lease to Herbert was a renting by the month, and under it he had a term less than two years. The lease by him to the Louisville Gunning System of the wall for advertising purposes was a transfer by him of an interest in the premises or a portion of it, and,

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being made without the consent of the landlord, operated as a forfeiture to the landlord by the terms of the statute. The purpose of the statute is to forbid such a transfer by the tenant without the consent of the landlord. The transfer, being forbidden by the statute, is void as to the landlord unless he consents to it. Of course, his consent may be given at the time, or it may be given afterward; but, unless he consents, the sub-tenant obtains no rights against him. The lease by Herbert of the wall to the Louisville Gunning System conferred upon it no rights as against Parks, and he had the right to paint out the sign which it had placed upon the wall. The painting of the sign upon the wall by the Louisville Gunning System being unlawful, it became liable to Parks for the damages he thereby sustained.

Judgment affirmed.

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CASE 62.—PROSECUTION AGAINST SAMUEL T. JACOBS FOR EMBEZZLEMENT.—October 1.

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Commonwealth v. Jacobs

Appeal from Jefferson Circuit Court.

Criminal Branch, JOSEPH PRYOR, Judge.

From a judgment of not guilty under a peremptory istruction of the Court the Commonwealth appeals— Reversed.

Embezzlement—What Constitutes.—An agent, with authority to collect money and retain a part for his services, is, on converting to his own use the entire amount collected, guilty of embezzlement, within Ky. Stats., 1903, section 1202, punishing any agent who shall embezzle or convert to his own use the money of his principal, though he was entitled to 15 per cent of the amount as his commission.

N. B. HAYS, Attorney General; JAMES QUARLES, J. M. HUFFAKER, LORAINE MIX and C. H. MORRIS, for appellant.

We submit that in view of the clear decision of this court in the case of Clark v. Commonwealth, 97 Ky., 96, and in the case of Stone v. Commonwealth, 104 Ky., 220, the fact that the defendant (appellee) was entitled to 15 per cent of the money which he collected and appropriated, this court will not sanction any such interpretation of the law as that given by the learned judge of the court below.

EARL & HUBBARD, attorneys for appellee.

It has been thoroughly shown by the proof in this case that the appellee had an interest in the fund to the extent of 15 per cent. This being true, as is shown by the authorities cited, the court's ruling in sustaining a motion for a peremptory instruction was correct.

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CITATIONS.

Stone v. Commonwealth, 104 Ky., 220; State v. Kent, 21 Am. Rep., 764; S. C. 22 Minn., 41; Commonwealth v. Libby, 45 Am. Dec., 185; 2 Archb. Cr. Pl., 569; 2 Bishop A. L., sections 335, 355, 356; Calkins v. State, 98 Am. Dec., 137n; S. C. 18 O. St., 366; Commonwealth v. Stearns, 2 Met. (Mass.), 343; Webb v. State, 8 Tex. App., 310; 4 Lawson Cr. Def., 894; Carter v. State, 53 Ga., 326.

OPINION OF THE COURT BY JUDGE HOBSON—Certifying law.

Samuel T. Jacobs was employed by the Western & Southern Life Insurance Company, a corporation with headquarters at Cincinnati, as an agent to solicit insurance and collect the premiums. The contract between Jacobs and the company, among other things, contained this provision as to the duty of Jacobs: "To keep true records of the business in the books provided by the company, and to account for and remit to the chief office, in Cincinnati, Ohio, or to the superintendent, as instructed, every week, on the day and in the manner required, all money received by me during the week." It was also in the contract that Jacobs should receive as "salary 15 per cent. of the amount actually collected each week and paid to the company." Jacobs collected from a number of policy holders money for the company, which he failed to pay over. He sent in his collection book by messenger, saying that the book was all he could send. Although the contract provided that his compensation should be 15 per cent. commission on the amount collected by him and paid over to the company, the uniform mode of doing business was for him to retain his 15 per cent. and pay over the balance to the company. He was indicted for embezzlement under section 1202, Ky. St. 1903, which is as follows: "If any

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officer, agent, clerk, or servant of any bank or corporation shall embezzle, or fraudulently convert, to his own use or the use of another, bullion, money, bank notes, or any effects or property belonging to such bank or corporation, or other corporation or any person, which shall have come to his possession or been placed in his care or under his management as such officer, agent, clerk, or servant, he and the person to whose use the same was fraudulently converted, if he assented thereto, shall be confined in the penitentiary not less than one and not more than ten years." On the trial of the case, the facts above stated were proved by a number of witnesses. At the conclusion of the evidence for the Commonwealth, the court peremptorily instructed the jury to find the defendant not guilty. This was done, and the Commonwealth appeals.

The ruling of the court was based upon the idea that, as Jacobs was entitled to 15 per cent. of the money, he was not guilty of embezzlement in using it. It will be observed that by the contract his compensation was to be 15 per cent. of the amount collected by him and paid over to the company. Under the contract, it was his duty to pay the whole fund over to the company, but no one can complain of that which he consented to, and, as the company consented to his taking out the 15 per cent, and paying over the 85 per cent. to it, it cannot complain of his taking out the 15 per cent. and he was guilty of no embezzlement in using the 15 per cent. But the right to use the 15 per cent. gave him no right to use the 85 per cent. The whole fund belonged to the company. It was in his hands as agent of the company. The fact that the company, to avoid circuity, allowed him to retain the 15 per cent. instead of having him pay over the

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whole fund to it, and for it then to return to him the 15 per cent. in no way affected the substance of the transaction. The fund was in his hands as agent of the company. He had no right to use out of the fund anything more than 15 per cent., and when he used the entire fund he converted to his own use the money of the company which had come into his possession as its agent. The rule was so announced in Clark v. Commonwealth, 97 Ky. 76, 29 S. W. 973, 16 Ky. Law Rep. 703. In the subsequent case in Stone v. Commonwealth, 104 Ky. 220, 46 S. W. 721, 20 Ky. Law Rep. 478, 84 Am. St. Rep. 452, the decision of the court rests on the ground that Stone was not the agent of the corporation and did not hold the money as its agent. The quotation in the opinion from the Encyclopedia of Law, as to the rule applicable where the agent is entitled to commission, was used only as a matter of argument, and related to a subject not before the court. This was pointed out in the later case of Com. v. Fisher, 113 Ky. 491, 68 S. W. 855, 24 Ky. Law Rep. 300, where the rule laid in Clark v. Com. was adhered to, and it was held that the offense under the statute was made out when a sheriff had embezzled the funds of the county, although the defendant was entitled to a commission out of the money collected by him.

In Campbell v. State, 35 Ohio St. 70, the precise question was raised, and in disposing of it the court said: "It is also claimed that, inasmuch as the defendant was entitled to a commission out of the funds collected as compensation for his services, he was a joint owner of the money, and was not therefore an agent within the meaning of the statute. This claim is not well founded. Although the defendant was entitled to a percentage of the moneys collected

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for his services, and might have taken and retained such percentage without being guilty of embezzlement, yet the entire sum, until such division was made, belonged to his employer, and he was a mere agent and custodian. The controlling difference between the relation of attorneys, auctioneers, warehousemen, etc., with their employers, and the defendant and his employers, is this: The former engage in an independent employment, subject only to the usages of their different lines of business, while the latter is subject to the direction and control of his employer. And while the former may not be subject to the penalties of this statute, the latter is clearly embraced within its terms and meaning." In Territory v. Meyer, 3 Ariz. 199, 24 Pac. 183, the court followed the rule laid down in Ohio. It said: "If an agent of a corporation authorized to carry on a business for his principal receives a commission upon the proceeds of the business, he is still a trustee for the use of his principal as to the remainder, and has in his possession property by virtue of his trust. In this case, Meyer was required to send at stated intervals the amount of the receipts of the office, less his commission. These amounts, at least, he held in trust for the corporation, and it was these which constituted the subject-matter of the embezzlement." In Com. v. Smith, 129 Mass. 104, the servant was intrusted with goods to sell, and was entitled to a commission on the proceeds. He sold the goods and converted the proceeds. It was held that he was guilty of embezzlement. See, also, People v. Civile, 44 Hun (N. Y.) 497; Brandenstein v. Way, 17 Wash. 293, 49 Pac. 511; Morehouse v. State, 35 Neb. 643, 53 N. W. 571; People v. Birnbaum, 114 App. Div. 480, 100 N. Y. Supp. 160; State v. Whitehouse, 95

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Me. 179, 49 Atl. 869; State v. Hoshor, 26 Wash. 643, 67 Prac. 386; State v. Collins, 1 Marv. (Del.) 536, 41 Atl. 144; Foster v. State, 2 Pennewill (Del.) 111, 43 Atl. 265; State v. Maines, 26 Wash. 160, 66 Pac. 431.

We are aware that the contrary rule was laid down in Minnesota in State v. Kent, 22 Minn. 41, 21 Am. Rep. 764, in Illinois in McElery v. People, 202 Ill. 473, 66 N. E. 1058, and in several other American cases following certain cases in England; but the English ruling is based upon the rule obtaining there that criminal statutes are strictly construed, due in part to the fact that all felonies in England were originally punished with death. The rule of strict construction as to criminal statutes is not in force in Kentucky. Section 459, Ky. St. 1903, provides: "There shall be no distinction, in the construction of statutes, between criminal or civil and penal enactments. All the statutes shall be construed with a view to carry out the intention of the Legislature." Although the defendant was entitled to 15 per cent. of the fund as his commission, he held the remaining 85 per cent. of the fund as the agent of the company, and, when he embezzled it, his act was as much within the purpose of the statute as if he had been entitled to nothing for commissions and had embezzled the whole fund.

We therefore conclude that the court erred in instructing the jury peremptorily to find the defendant not guilty, and this is ordered to be certified.

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CASE 63.—PROSECUTION OF C. D. BALL AND PATTEN BALL FOR MURDER.—October 2.

126 542
136 165

Commonwealth v. Ball, etc.

Appeal from Bell Circuit Court.

M. J. Moss, Circuit Judge.

From a judgment of acquittal on peremptory instruction the Commonwealth appeals—Opinion certified.

1. Criminal Law—Jurisdiction of Offense—Locality of Offense.—Where deceased was shot in one state, and died in another, the crime was committed in the state where the shooting occurred, and the courts of that state have jurisdiction.
2. Same—Former Jeopardy—Acquittal—Direct Verdict.—Under Constitution section 13, providing that no person shall be twice put in jeopardy of life or limb for the same offense, even if a mistrial in a criminal case caused by defendant could not be relied on as former jeopardy, an actual acquittal, though upon improper ground raised by defense, is a former jeopardy and a bar to further prosecution.

N. B. HAYS, Attorney General, and C. H. MORRIS, for appellant.

1. The appellee's discharge is a fraud on the commonwealth and does not constitute a bar to further prosecution. It is the contention of the state that the facts show that the verdict was and is a fraud. After the state had shown the corpus delicti, and had called Mitchell Teasley to the witness stand, the defendants asked that the jury be withdrawn for the purpose of their making a motion. This motion having been sustained, the defendants moved that the court discharge them, because it had no jurisdiction of the murder, as it was shown by the evidence that the wounds were inflicted in Kentucky, and Cotrell died in Tennessee. The commonwealth objected and asked that it be permitted to show by competent proof that the defendants shot the deceased in Middlesboro, Bell County, Kentucky, and avowed it then had witnesses present by whom it could prove the same. The court

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refused to permit the commonwealth's attorney to proceed, and peremptorily instructed the jury to find the defendants not guilty. It is the contention of the state that this is a corrupt verdict and a fraud on the state. And were it not, that the commonwealth was a party and was prosecuting the charge it would be absolutely void; but inasmuch as the commonwealth was a party the verdict is voidable and may be set aside in a direct attack as the appeal herein, and the case ordered reinstated on the docket of the trial court for further proceedings, and said verdict will not be good as a plea in bar.

2. The discharge of the defendant was not the verdict of the jury, such as constituted a deliverance of the defendants within the legal meaning of the constitutional provision. It was the order of the court made by the court after it had held that it had no jurisdiction of the offense, and said verdict is without any legal effect whatever and is void, or at least voidable. It is not so much as a defective verdict—which will not operate as a bar—but it is not the verdict of the jury charged with the deliverance of the defendant in any legal sense whatever. This contention is upheld by the following authorities: State v. Oliver, 30 La. Ann., 470; People v. Travers, 77 Cal., 176; Lawrence v. People, 2 Ill. (1 Seam), 414; ex parte Brown, Ala., 15 S. R. 602).

3. Thus far we have dealt with the question of the plea of former jeopardy in cases where a jury or a juror were discharged and another jury or juror substituted, with the consent of the accused. We contend that where there is objection by the defendant to the jurisdiction, the plea of former jeopardy will not stand. Duffy v. Britton, 48 N. J. L., 371; State v. Spayde, 110 Iowa, 726; Marshall v. Commonwealth, 20 Grat. Vt., 845.

RHORER, AINSWORTH & DAWSON, counsel for appellees.

Murder, in this state, is a common law offense, with the penalty fixed by statute. Our statutory law is silent as to what constitutes murder, and only fixes the penalty therefor. So we are compelled to look to the common law to determine the necessary ingredients of the crime.

2. Having determined that murder is a common law offense, it naturally follows that the common law is the source of jurisdiction in murder cases, except to the extent same has been modified by statute, if it has been modified.

3. It stands an undisputed proposition, we presume, that the common law of England, together with all facts of Parliament of a general nature, and not local to the British Islands, enacted prior to March 24th, 1607, constitute the common law of this state,

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and are still in force in this state, except when modified or repealed by statute.

4. It is very doubtful if this state, or any state, could pass a law to the effect that a person striking a mortal blow in one state, the death resulting in another, could be convicted of murder in the state where the death occurs, when the offenders agency ceases with the giving of the blow, but there is no doubt whatever, that our legislature has authority to define what shall be punished as murder, and a law to the effect that the giving of a mortal blow in this state, shall be punishable as murder, regardless of the place of death, would be unquestionably a valid exercise of the legislative authority to define and punish crime, but until such a statute is enacted, it is submitted that the courts of this state have no authority to indict one for murder, a common law offense, where all the elements necessary to constitute the offense are not present within the limits of this state.

5. We presume it will not be argued by the commonwealth, that in event the lower court is reversed in this case, the court should hold that the appellees have not been in jeopardy. The defendants announced ready, the jury was sworn, and the case actually gone into, one witness having testified before the peremptory instruction was given, so that even if the court should hold that the lower court was in error, we think there can be no question as to the fact that appellees have once been in jeopardy, and should not be compelled against to face trial on the indictment in this case.

OPINION OF THE COURT BY JUDGE HOBSON—Certified.

The appellees were indicted by the grand jury of Bell county for the crime of murder in killing Meade Cottrell. They were placed on trial. The Commonwealth introduced evidence showing that the deceased was killed by the defendants in Bell county by shooting him with a pistol. The shooting and wounding occurred in the State of Kentucky. After Cottrell was wounded, he was put upon an engine and carried across the State line to his father's, in Tennessee, where he died a few hours afterwards. When these facts were shown, on motion of the defendants, the court instructed the jury peremptorily to find the

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defendants not guilty, which was done, and, judgment having been entered upon the verdict, the Commonwealth appeals.

The first question to be determined is whether the Bell circuit court had jurisdiction where the mortal wound was given in Kentucky and the person shot was carried into Tennessee and died there. In Roberson on Criminal Law, section 214, the rule is thus stated: "At common law, the state in which the mortal wound was given has jurisdiction in cases of homicide, so that, if a mortal wound be given in this State, and death ensues in another, the courts of this State have jurisdiction to try the offender; the going of the injured party into another state being his own voluntary act, and not the act of the defendant." In 1 Bishop on Criminal Law, section 113, the rule is thus stated: "The reader perceives that, according to these cases, the crime in felonious homicide consists in inflicting the blow, while the act of dying, which is performed by the injured person, does not constitute any part of it, or at least such a part as to lay the foundation for a jurisdiction over the offense. This accords with what was before held in England, that a homicide is committed in a county if the blow is inflicted in it, though the death takes place elsewhere." These are accurate statements of the law. We therefore conclude that the court erred in instructing the jury peremptorily to find the defendants not guilty.

It is insisted for the State that the judgment of the circuit court be reversed, and the case remanded for a new trial. By section 13, of the Constitution, no person shall for the same offense be twice put in jeopardy of his life or limb. Under this provision, it is held that a person is in legal jeopardy when he

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is duly put upon trial, and that the trial begins with the swearing of the jury. In the case at bar, the defendants were regularly indicted, the jury were regularly impaneled and sworn, and under the instructions of the court, after the evidence was heard, returned a verdict finding the defendants not guilty. They were undoubtedly put in jeopardy when they were thus placed upon trial, and if they may be tried again they will be put twice in jeopardy for the same offense. We are referred to a number of authorities holding that, if there is a mistrial which is brought about by the act of the defendant, he cannot rely upon the plea of former jeopardy. Thus, if the defendant asks that the jury be discharged, or if he consents thereto, he can no more complain of this than he could of the discharge of the jury if he had with a deadly weapon dispersed them and thus broken up the trial. But there is a manifest distinction between a mistrial and a trial where the jury have found the defendant not guilty. All the cases to which we have been referred by the Attorney General were cases of mistrial brought about by acts of the defendant or by his consent. If the defendant may be tried again when he has been acquitted upon a peremptory instruction asked by him, the same rule should be applied when the instruction, though not in form peremptory, is equivalent to a peremptory instruction, or where the rulings of the court in the admission or rejecting of evidence are equivalent to a peremptory instruction. It is incumbent upon the court to give the jury the whole law of the case, and if the defendant had remained quiescent it would have been the duty of the court to decide the question which was raised by him and instructed the jury upon it. The Constitution guarantees the defendant

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counsel in the management of his case. The right to the assistance of counsel would be a vain thing if the counsel might not raise such questions as they deemed proper. The guaranty that a person shall not be put twice in jeopardy would amount to but little if he could be tried a second time wherever his acquittal was due to an error of the court committed upon his motion. It is immaterial that the circuit judge gave the peremptory instruction on the ground that the court was without jurisdiction. We cannot go into the reasons which actuated him. The fact is that under the instructions of the court the jury have regularly found the defendants not guilty, and they cannot be further prosecuted. This is ordered to be certified.

The CHIEF JUSTICE dissents from so much of this opinion as holds that the defendant has been once in jeopardy by the mistrial which resulted from his own unauthorized motion.

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CASE 64.—ACTION BY EMMA MEYERS AGAINST THOMAS DUNN FOR UNLAWFUL ARREST AND ASSAULT AND BATTERY.—October 2.

Myers v. Dunn

Appeal from Kenton Circuit Court.

M. L HARBESON, Circuit Judge.

Judgment for defendant, plaintiff appeals.—Affirmed.

1. Arrest—Without Warrant—Offenses Committed in Presence of Officer.—One using abusive language toward a constable and interfering with the performance of his duties commits in the presence of the constable offenses authorizing the constable to arrest without warrant.
2. Same—Custody of Prisoner.—It is not illegal for a constable, arresting one without a warrant and taking him before a magistrate, to place him in the custody of the magistrate pending the disposition of the case, either by immediate trial or the fixing of a date therefor.
3. Same.—Where a prisoner, arrested without warrant, is placed by the officer in the custody of the magistrate until he can dispose of the case, either by trial or the fixing of a date therefor, and attempts to leave the office of the magistrate, he may use reasonable means to prevent her leaving his custody.
4. Appeal—Verdict—Conclusiveness.—A verdict on conflicting evidence is conclusive on appeal.
5. Arrest—Disposition of Prisoner—Statutes—Construction.—The word "forthwith," in Cr. Code Prac., sections 48, 50, requiring a magistrate before whom one is charged with an offense to proceed "forthwith" to an examination or trial, means reasonable time, determined by the facts of the case, and a prisoner brought before a magistrate and detained about an hour is not unreasonably restrained, where during that time she refused to submit to the magistrate's custody and by her conduct contributed to the delay by obstructing him in taking proper action.

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HELM WOODWARD and B. F. GRAZIANI, attorneys for appellant.

AUTHORITIES CITED.

First—Incompetent testimony. Sections 1088, 1627, Ky. Stats.; section 715, Civil Code; Mt. Sterling National Bank v. Brown, 19 Ky. Law Rep., 1416; Commonwealth v. Mills, 14 Ky. Law Rep., 107; Cole v. Hanks, 19 Ky. Law Rep. (3 T. B. Mon.), 208; Stromberg v. Earick, 45 Ky. (6 B. Mon.), 578; Patton v. Kennedy, 8 Ky. (1 A. K. Marsh.), 289; France v. Frazier, 30 Ky. (7 J. J. Marsh.), 425.

Second—Instruction "E." Criminal Code, sections 48, 50, 323, 324; Revill, etc., v. Pettitt, 60 Ky. (32d), 314.

Third—Instruction "F." Crosby v. Bradley, 11 Ky. Law Rep., 954; Rapdale v. Ezell, 20 Ky. Law Rep., 1567; More v. Young, 20 Ky. Law Rep., 1932; Ryan v. Quinn, 24 Ky. Law Rep., 1513; Crabtree v. Dawson, 26 Ky. Law Rep., 1046; Doerhoefer v. Shewmaker, 29 Ky. Law Rep., 1193; Crocker v. Haley, 29 Ky. Law Rep., 174.

Fourth—Instructions one and two. L. & N. Ry. Co. v.Banks, 19 Ky. Law Rep., 1065; Moran v. Higgins, 19 Ky. Law Rep., 456; Coppage v. Griffith, 19 Ky. Law Rep., 456; M. & O. R. R. Co. v. Reeves, 25 Ky. Law Rep., 2236; Mitchell-Tranter Co. v. Ehmett, 23 Ky. Law Rep., 1783; Bowling Green Stone Co. v. Capshaw, 23 Ky. Law Rep., 945; Travelers Ins. Co. v. Higgins, 19 Ky. Law Rep., 456.

WM. A. BYRNE, attorney for appellee.

POINTS AND AUTHORITIES.

This honorable court will observe that appellee pleaded that he detained appellant only for such time as was required by him for the investigation and consideration of the grounds and facts of the complaint charged against appellant by the officer, McLaughlin, and the instructions in this respect are more favorable to appellant than to appellee inasmuch as they did not fix any time which would be considered by the jury as unreasonable or unlawful for appellee to detain appellant, but confine the jury in this respect to the time required by the magistrate for such an investigation or consideration of the charge against appellant. No single fact in the testimony is made prominent in the instructions and there can be no objection to their form. They contain the whole law of the case with a statement of the facts, only which are necessary to be stated.

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AUTHORITIES CITED.

Pepper v. Mayes, etc., 5 Ky. Law Rep., 708; Deckerman v. Northern Trust Co., 20 Sup. Ct. 311, 315, 176 U. S. 181, 44 L. Ed. 425; Blackinston v. Potts (Pa.), 2 Miles, 388; McLam v. Warren, 3 Pa. Dist. R., 585, 586; Witsle v. Holt, 95 Ind., 60; Booze v. Tate, 43 Ind., 60; Downing v. State, 49 Ind., 56; Diers v. Mallon, etc., 46 Neb., 121; Linnen v. Barefield, 114 Mich., 93.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

Appellant sued appellee in the court below for the unlawful arrest of and an assault and battery upon her person, alleged to have been illegally committed by appellee, for which she claimed $5,000 damages. Appellee answered, denying both the arrest and assault and battery, and alleging in substance that one W. P. McLaughlin, a constable of Kenton county, having arrested appellant for using in his presence and to him abusive and threatening language and interfering with him while acting as an officer in the performance of his duties, took her before appellee, a duly elected and acting justice of the peace in and for Kenton county, and temporarily left her in his custody for disposition of the charge against her; that before any disposition of her case had been or could be made, and before a bond was given by her or could be arranged for, she attempted to leave appellee's office and custody, whereupon appellee, to prevent her from doing so, gently interposed, using no violence, and no more force than was necessary for the purpose of detaining appellant until he could determine what disposition to make of the charge preferred against her. The affirmative matter of the answer was denied by reply, thereby completing the issues. The trial resulted in a verdict and judgment in favor of appellee, followed by a motion on appellant's part for a new trial, which was overruled.

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It appears from the record that a furniture dealer caused to be issued and placed in the hands of McLaughlin, constable, an order of delivery for certain articles of furniture in the possession of Mrs. Randall, a daughter of appellant. When the constable appeared at appellant's home, where the furniture was stored, appellant and Mrs. Randall, both of whom were present, applied abusive and threatening language to the officer, attempted to prevent him from executing the process in his hands, and would not permit him to remove the furniture. Whereupon he arrested both of them for their use of the abusive and threatening language and for interfering with the performance of his official duties, and immediately carried them to appellee, that the latter as a justice of the peace might try or otherwise dispose of the charges against them. If appellant and her daughter were guilty of either of the offenses charged, and it does not seem to be denied that they were guilty of both, the fact that they were committed in his presence authorized their arrest by the constable without a warrant, and after the arrest it was his duty to take them at once, as was done, before appellant, or some judicial officer of like power, for trial, or to enable them to give bond for their appearance and to answer the charge against them at such time as the magistrate might set for their trial. Upon arriving at appellee's office with the prisoners, the constable, being, as shown by the evidence, compelled to immediately return to appellant's home for the purpose of executing the order of delivery by taking possession of the property therein described, left them in the custody of appellee until he could make some disposition of the cases, either by immediate trial or

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the fixing of a date therefor, and affording them opportunity to give bond for their appearance at the time fixed for such trial. The act of the constable in placing the prisoners in appellee's custody for the purpose indicated was not illegal, nor did appellee, in taking them into custody, act, without authority; and if, while, in his custody, appellant, in disobedience of appellee's commands, attempted to effect her release by trying to leave his office and break away from his custody before he could reasonably determine what disposition to make of the case, either by then trying her or setting it for trial at a subsequent convenient and reasonable time, and in the latter event require of her a bond to answer the charge preferred at such time, then appellee had the right, by the use of reasonable means and without unnecessary force, to prevent her from leaving his office and custody.

The evidence is conflicting as to what occurred when appellant and her daughter attempted to leave appellee's office. The testimony of mother and daughter conduced to prove that, when they started from the office, appellee got between them and the door, forcibly took hold of them, and violently and repeatedly threw them back and against the walls of the office, by which appellant was frightened and injured. The testimony of appellee and one other witness was, however, to the effect that no such force was used by appellee, and that the only thing he did was to get between the women and the door, when they started to leave the office, and that while in that position he once gently placed a detaining hand upon appellant's shoulder to indicate to her that she would not be allowed to leave the office. It further appears from the evidence that, upon the return of the constable to appellee's office, appellant and her daughter

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were permitted to depart upon their own recognizance, and that neither of them was ever brought to trial. It is not our province to pass upon the facts of the case, as to do so would be to invade the domain of the jury. Having weighed the evidence, the jury by their verdict declared their belief in appellee's version of the matters litigated. Accepting the truth of the verdict, we must conclude that appellant's detention of appellee was not illegal, and also that appellee was not guilty of the assault or battery complained of.

It is, however, strongly insisted for appellant that, though it be conceded appellee as a judicial officer had the right to receive appellant as a prisoner from the constable, because of the offense charged against her by that officer, she was, nevertheless, under the Criminal Code, entitled to an immediate or "forthwith" trial or other proper disposition of her case, and that it appears from the evidence that she was unreasonably restrained of her liberty and was not forthwith tried. In view of the facts appearing in the record, we do not think this complaint well founded. According to appellant's own statement she was detained by appellee from 9 o'clock a. m. to 12 o'clock noon; but no other witness supports her. The other witnesses agree that the time of her detention did not exceed an hour, and it appears that during the whole of that time she was refusing to submit to appellee, and by her angry manner and language contributing to the delay, thereby obstructing him in taking such action as might have resulted in her earlier discharge from custody. While it is true that sectons 48 and 50, Cr. Code Prac., provide that an offense charged against one brought before a magistrate shall be forthwith examined into by that

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officer, the word "forthwith" is not necessarily construed as meaning immediate. The construction given generally by the courts to the words "immediately" and "forthwith," whether occurring in contracts or statutes, is that the act referred to should be performed within such convenient time as is reasonably requisite, and what is a reasonable time is to be determined by the facts of the particular case in hand.] Lincoln v. Field, 54 Ark. 471, 16 S. W. 288; Pennsylvania R. R. Co. v. Reichert, 58 Md. 261; Pittsburgh, V. & C. Ry. Co. v. Commonwealth, 101 Pa. 192; Martin v. Pifer, 96 Ind. 245; Kent v. Miles, 65 Vt. 582, 27 Atl. 194. As said in Pepper v. Mayes, etc., 81 Ky. 678, 5 Ky. Law Rep. 708; "But the authority to arrest, to try, and to require bond necessarily implies that the accused may be restrained of his liberty, within a reasonable limit, pending or preparatory to such examination. The law does not require a judicial officer to hold his court at all hours of the night and day, nor does it require that he should do violence to his conscience by holding an examining court on the Sabbath, although the proceeding of an examining court held on that day may be valid. Nor does the law require or permit such an officer to try one who is temporarily incapacitated by drink to attend to or understand the charge preferred against him. The situation was this: The hour, 11:30 p. m. Saturday. Appellant brought before the justice of the peace on a warrant sworn out by the affidavit of appellant's son, in which the son makes oath that appellant had threatened to take his life, and that it will be endangered so long as appellant is not restrained in his liberty. Appellant is crazed with drink and manifests his dangerous character in the presence of the court by cursing an officer. What,

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then, was the justice to do? It was manifestly too late to try the accused before midnight if he had been in condition, and the law does not compel the justice to hold his court on the Sabbath. Certainly the justice would not have been justified in turning appellant loose upon the community, with the probability, as shown by the affidavit, that he would take the life of his son before morning." In view of the authorities supra and the facts of the case at bar, we are not inclined to disagree with the finding of the jury that appellant was not unreasonably restrained of her liberty by appellee.

Without noticing in detail appellant's objections to the trial court's ruling in admitting and rejecting testmony, it is sufficient to say that no prejudicial error in respect thereto appears to have been committed by the court. The same may also be said as to the instructions; for, on the whole, they did not withhold from the jury any essential aspect of the law applicable to the case.

Judgment affirmed.

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CASE 65.—ACTION BY THE LOUISVILLE & NASHVILLE R. R. CO. AGAINST UELTSCHI'S EXECUTORS TO OBTAIN A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE.—October 3.

Louisville & N. R. R. Co. v. Ueltschi's Admr.

Appeal from Farnklin Circuit Court.

R. L. STOUT, Circuit Judge.

From a judgment of dismissal plaintiff appeals—Affirmed.

1. New Trial — Newly Discovered Evidence — Cumulative Evidence.—In an action against a railway company for the death of a pedestrian at a crossing, a witness testified that she saw him near the crossing, and then went into the house, and shortly the train passed. Another witness testified that he saw the pedestrian, that he stopped and looked up and down the track, and that the witness walked about 8 or 10 feet, when the train rushed by. Held, that the evidence of the latter witness was merely cumulative, and not indispensable to a recovery by plaintiffs and a new trial on the ground of newly discovered evidence that the latter witness' testimony was false was properly refused.
2. Same.—A new trial will not be granted to enable the defeated party to introduce new evidence, unless the reasons why it should be done are strong, and it is made to appear with reasonable certainty that injustice will result unless the relief is granted.
3. Appeal—Effect as to Motion for New Trial.—Where, pending an appeal by a party against whom a judgment has been rendered, he discovers within the time allowed by law a cause for opening the judgment in the lower court, he will not be denied the right to do so because he is prosecuting an appeal.

JOHN T. SHELBY, Attorney for appellant.

IRA JULIAN of counsel.

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On the question of diligence in making this application for a new trial, we submit that under subsection 7 of section 340, Civil Code, the newly discovered evidence authorizing a new trial is such as the party "could not with reasonable diligence have discovered and produced at the trial." The question of diligence, therefore, is one which relates only to the matter of the production of the testimony at the original trial, and it does not at all relate to the matter of tne discovery after the trial and judgment.

Under section 344, if the evidence be discovered after the trial at which the judgment is rendered, the application for the new trial must be made "not later than the second term after the discovery." This is the only limitation. It will be noted that the words are not "After the time when by the exercise of reasonable diligence it might have been discovered," but simply "not later than the second term after the discovery."

B. G. WILLIAMS for appellee.

J. H. HAZELRIGG of counsel.

POINTS AND AUTHORITIES CITED.

1. No separation of law and facts on motion for new trial. The Albion Company v. Ellinger, 19 Ky. Law Rep., 1886; same, p. 1981; Helm v. Coffey, 80 Ky., 176; Henderson, etc., v. Dupree, etc., 82 Ky., 681; Beeler v. Sandidge, 20 Ky. Law Rep., 1581; Day v. Adams, 20 Ky. Law Rep., 1827; American Mutual Aid Society v. Bronger, 91 Ky., 406; Hatfield v. Adams, 96 S. W., 583.

2. As to vigilance. Section 344, Civil Code; Price's Adm'r v. Thompson, 84 Ky., 224; Chandler v. Thompson, 30 Fed. Rep., 38; Chicago & Eastern Railroad Company x. McKeehan, 5 Ind. Appeals, 124.

3. Materiality. City of Chicago v. Edison, 43 Ill. Appeals, 417; Allen v. Perry, 69 Ky., 85; 71 Wisconsin, 641; Fleet v. Hollenkamp, 52 Ky., 219; Scott v. Scott's Executrix, 82 Ky., 328; Coffey v. Proctor Coal Co., 14 Ky. Law Rep., 416; Nichols v. Mechanics Insurance Co., 16 N. J. Law; City of Paris v. Marrell, 52 Ill. Appeals, 121; 3 Graham and Waterman, 1537.

4. Must be upon the issue. Clark v. Rutledge, 9 Ky., 381; Barrett v. Belske, 7 Ky., 348; Shreve v. Baxter, 71 Ind., 352; Hargis v. Price, 34 Ky., 79; Findley v. Tyler, 11 Ky., 161; Carpenter v. Coy, 67 Barbee, 411.

5. The newly discovered evidence must not be merely cumula-

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tive. Richardson Bros. & Co. v. Huff, 19 Ky. Law Rep., 1428; Aetna Insurance Co. v. Sparke, 62 Ga., 187.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

This is an action to obtain a new trial upon the ground of newly discovered evidence. On the original trial, in which appellees obtained judgment for damages growing out of the death of their testator, caused by the negligence of appellant in failing to give proper warning of the approach of its train to the public crossing at which he was struck, three defenses were made: First, that Ueltschi was not killed at a public crossing; second, that he was guilty of such contributory negligence as defeated a recovery; and, third, that the appellant was not guilty of any negligence. In the course of the trial a witness named Garland McDonald testified in substance that he was standing in the door of a blacksmith's shop and saw decedent as he approached the track, and when within a few feet of it, at the point where he was killed, stop and look up and down the track. It is stated in the petition, which was filed in December, 1906, that appellant discovered a few months before that McDonald was not in the shop or in the vicinity where he claimed to have been, and did not see or know anything about how the accident occurred; that he was induced by the payment of money to make the statements given in evidence by him, which were in every particular false. The lower court, after hearing evidence introduced for and against the petition, dismissed it, and appellant prosecutes this appeal.

The evidence as to whether McDonald was or not at Ueltschi's on the day he was killed is very conflict-

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ing. It is extremely difficult to arrive at any satisfactory conclusion concerning this disputed point. There is strong evidence, supported by persuasive circumstances, tending to show that McDonald on the day of the accident was at Lacefield's some two miles distant from Ueltschi's place. On the contrary, several witnesses testified that he was at Ueltschi's. But this controverted question we do not feel it necessary to determine, as if it be admitted that McDonald was not at Ueltschi's and that he gave false testimony on the trial, there was other evidence introduced upon the points about which McDonald testified sufficient to take the case to the jury and to sustain a verdict. This conclusion is, we think, fully supported by the following statement of facts contained in the opinion found in 97 S. W. 14, 29 Ky. Law Rep. 1136: "The residence of the decedent was upon the north side of the railroad track, and there were three other small houses, used as a buggy house, hen house, and shop, on the same side of the track, west of the dwelling. The dwelling was 50 or 60 yards from the track. Across the railroad from the house was the barn, crib, and stable of decedent. The public road crossed the railroad, at grade, at a point almost between the house and the barn. The railroad curves slightly to the north, just beyond this crossing, and runs through a deep cut. Decedent and his family used this public crossing over the railroad in passing to and from their house to the barn on the opposite side of the track. About noon on May 2, 1904, the decedent and his hired hand and two boys were engaged in some kind of work in his barn. He left the barn, as stated by the hired man, to go over to the house to telephone one of his boys, who was in Frankfort, to come home. He said he would come

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back in a few minutes. He stayed at the house but a short time, and started back to the barn. It was raining at the time, and he took a gum coat and threw it over his shoulders, and started down a little path which led from the house to the public crossing, in the direction of the barn. Miss Freda Hurney, a young lady whom the Ueltschi family had raised, was out on the side porch, and saw him go down the path in the direction of the barn, and when he had nearly reached the railroad track at the crossing she turned and went into the house. When he had approached within 8 or 10 feet of the track, he paused, looked up and down the track, and then started over towards the barn, and this was the last seen of him alive. In a very short time thereafter the train passed by, and he was found at a point in the field, 250 yards or more from the crossing, where he was seen by one of the trainmen to fall from the cow-catcher or pilot of the engine. * * *Miss Freda says that she had barely had time to walk across the porch and through one room when the train passed. Garland McDonald, who was standing in the shop door, and saw decedent as he approached the track, and stopped, or halted, and looked up and down the track, says that he walked but 8 or 10 feet to his anvil in the shop when the train rushed by." McDonald's evidence was merely cumulative, and not indispensable to a recovery by appellees; nor can it be fairly said that in the absence of this evidence the result would not have been the same.

New trials are reluctantly granted; and, when disputed matters have been fully litigated, the courts will not reopen a case for the purpose of enabling the defeated party to introduce new evidence, unless the reasons why it should be done are very strong, and

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it is made to appear with reasonable certainty that injustice or wrong would result unless the relief was granted, and another opportunity allowed to relitigate the question in issue. This court has frequently had before it applications for new trials upon the ground of newly discovered evidence, and it has uniformly been held that a new trial will not be granted when the point upon which it is sought was in issue in the former trial, unless the discovered evidence be of such a permanent and unerring character as to preponderate greatly or have a decisive influence upon the evidence to be overturned by it. And especially does this rule obtain with respect to parol testimony. Price v. Thompson, 84 Ky. 219, 8 Ky. Law Rep. 201, 1 S. W. 408; Torian v. Terrell, 122 Ky. 745, 29 Ky. Law Rep. 306, 93 S. W. 10; Mercer v. Mercer, 87 Ky. 21, 9 Ky. Law Rep. 870, 884, 7 S. W. 307; Allen v. Perry, 6 Bush (Ky.) 85; Richardson v. Huff, 43 S. W. 454, 19 Ky. Law Rep. 1428. Keeping in mind that McDonald's evidence was parol, and that it was upon a point directly put in issue and concerning which several witnesses testified, it must be conceded that it was cumulative, and it cannot be said to have been so conclusive as to have had a decisive influence upon the jury who hear it.

Another reason for denying a new trial is that here the attempt is to impeach the testimony of a witness who testified on the original trial. It is not claimed that any new evidence bearing upon the substantive issues involved in the trial has been discovered; but the argument is made that the evidence of a witness who testified in behalf of the successful party was false, and a new trial is sought to afford opportunity to contradict the testimony given by this witness. So far as our investigation goes, we have not been

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able to find any authority to support the position that a new trial may be granted for the sole purpose of impeaching the testimony of a witness whose evidence is merely cumulative. On the contrary, the rule seems to be that newly discovered evidence which only tends to discredit or impeach such an opposing witness will not authorize a new trial. L. & N. R. R. Co. v. Tinkham's Adm'r, 44 S. W. 439, 19 Ky. Law Rep. 1784; Barrett v. Belshe, 4 Bibb (Ky.) 348; Findly v. Tyler, 1 Litt. (Ky.) 161; Louisville Ins. Co. v. Hoffman, 24 Ky. Law Rep. 980, 70 S. W. 403. It would seem, however, that if the verdict or decision rested upon the testimony of a witness, or his testimony was of a decisive or controlling character, and it could be shown by newly discovered evidence that his evidence was false, it would be allowable to grant a new trial upon this showing. Illinois Central R. Co. v. McManus, 67 S. W. 1000, 24 Ky. Law Rep. 81. But this latter proposition is not before us in this proceeding, and it is not necessary to further discuss it.

A question of practice has been raised that we will dispose of. When the petition for a new trial was filed, an appeal on behalf of plaintiff from the judgment sought to be vacated was pending in this court, and the question is made as to the right of a party to institute and maintain an action to set aside a judgment while he is in another proceeding and court seeking to have it reversed. The Code limits the time in which an action to vacate a judgment on the ground of newly discovered evidence must be made; and if a party who has prosecuted an appeal from a judgment against him could not, pending the appeal, institute his action in the lower court to have a new trial, and was obliged to wait until his appeal had

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been finally disposed of, it might happen that the time in which an action to open the judgment could be filed had expired, and the result would be that, however meritorious the reasons for granting a new trial, it must be denied because the application was not made in time; and, as the reasons for a new trial could not be brought to the attention of this court, the party would be entirely without remedy. When, pending an appeal by a party against whom judgment has been rendered, he discovers within the time allowed by the Code any cause for opening the judgment by an action in the lower court, he will not be denied the right to do so because he is prosecuting an appeal from the judgment.

Perceiving no error, the judgment must be affirmed.

CASE 66.—PROSECUTION AGAINST THE CINCINNATI, N. O. & T. P. Ry. Co. FOR CARRYING INTOXICATING LIQUORS INTO A LOCAL OPTION DISTRICT.—October 3.

Cincinnati, N. O. & T. P. Ry. Co. v. Commonwealth

Appeal from Boyle Circuit Court.

W. C. Bell, Circuit Judge.

Defendant convicted and appeals.—Reversed.

1. Intoxicating Liquors — Offenses — Transportation. — Where a carrier received in another state intoxicating liquor consigned to a person in the state, and delivered the same to him in a

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county where the local option law prevailed, its act was within Acts 1906, p. 320, c. 63, declaring it unlawful for a common carrier to bring into or deliver in any county, etc., where the sale of intoxicating liquor is prohibited, any intoxicating liquor.

2. Commerce—Interstate Commerce—Regulation by States.—Under the provision of the Constitution of the United States that Congress shall have power to regulate commerce among the several states, Acts 1906, p. 320, c. 63, which undertake to impede, burden, or regulate the bringing of intoxicating liquors by carriers into the state, is unconstitutional and void.
3. Same—Intoxicating Liquor.—That liquor was taken from a point in Kentucky to a point outside the state, and from there shipped back to a consignee in Kentucky, for the purpose of evading the local option law of Kentucky, did not as against the carrier render such shipment subject to state regulation, as not being interstate commerce.
4. Same.—Whether a carrier knew that the commodity presented for transportation from one state to another was malt liquor, or that the point to which shipped was in a local option district, is immaterial as affecting the liability of such shipment to the state regulation.

CHARLES H. RHODES attorney for appellant.

JOHN GALVIN of counsel.

The appellant being a common carrier engaged in interstate commerce, carried the case of beer from Cincinnati, Ohio, to Danville, Ky., and there delivered it to the consignee in pursuance of a contract made by it with the shipper in Cincinnati. In making and performing that contract of shipment the appellant was engaged in interstate commerce, and the statute which made the doing of that thing an offense, is repugnant to the commerce clause of the Constitution of the United States.

AUTHORITIES CITED.

Lottery Cases, 188 U. S., pp. 321-352; Wabash, St. L. & Pa. Ry. Co. v. Illinois, 118 U. S., p. 557; Vance v. Vandercook Co., 170 U. S., pp. 438-444; Bowman v. C. & N. Ry. Co., 125 U. S., p. 465; Leisy v. Hardin, 135 U. S., pp. 100-110; Heyman v. Southern Ry. Co., 203 U. S., p. 270; Rhodes v. Iowa, 170 U. S., pp. 412-415; Lord v. Goodall, N. P. S. S. Co., 102 U. S., p. 541; Pacific Coast S. S. Co. v. R. R. Commissioners, 18 Fed. Rep., p 10; Hanley v Kansas

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City Ry. Co., 187 U. S., pp. 617-619; American Express Co. v. Iowa, 196 U. S., p. 133; Adams Express Co. v. Iowa, 196 U. S., p. 147; Adams Express Co. v. Commonwealth, decided in May, 1907, by the Supreme Court of U. S.; Ky. Stats., section 5557B; Ball v. Commonwealth, 81 Ky., p. 663; Session Acts 1906, p. 320.

N. B. HAYS, Attorney General, for commonwealth.

Under the rulings of the Supreme Court of the United States, the appellant could not refuse to carry the package when tendered to it at Cincinnati, Ohio, and although it was shipped from Newport by automobile or otherwise to its freight station in Ohio and from there to Danville, it seems under the ruling of the Supreme Court in the case of Hanley v. Kansas City R. R., 187 U. S., 619, it was an interstate commerce shipment. Under the ruling in this case and the similar rulings in the Adams Express Company cases recently decided, and the cases therein referred to, we are of the opinion that the transportation by the appellant company was and is an interstate shipment and is within itself interstate commerce, and it is therefore not liable. I do not feel that it is my duty to contend for a legal proposition which I believe to be unsound.

OPINION OF THE COURT BY JUDGE BARKER—Reversing.

The appellant, Cincinnati, New Orleans & Texas Pacific Railroad Company, was indicted by the grand jury of Boyle county, charged with the offense of transporting liquor into Boyle county where the local option law prevails, in contravention of the provisions of an act of the General Assembly of the Commonwealth of Kentucky approved March 21, 1905. entitled "An act to regulate the carrying, moving, delivering, transferring, or distribution of intoxicating liquors in local option districts." Acts 1906, p. 320, c. 63. A plea of not guilty was entered, and a trial resulted in the conviction of the defendant and the infliction of a fine of $60 of which it is now complaining.

The evidence showed that appellant is a railroad

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corporation whose northern terminus is in Ohio, and whose southern is in the state of Tennessee, and that it is engaged in the business of a common carrier between its terminii and all immediate points along its line; and it received in the city of Cincinnati, in the regular course of business, a box containing five gallons of beer in bottles, which was consigned to Henry Silliman, in Danville, Ky.; that, as a common carrier, it transported this box from Cincinnati to Danville, and there delivered it to the consignee. There can be no doubt that this act of the defendant (appellant) is directly within the prohibition of the statute under which the indictment was framed, and that, if it is within the province of a State by its laws to regulate or control interstate commerce, then the conviction and punishment of the defendant was just and proper. It has been a well-settled principle ever since the case of Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23, that under the Constitution of the United States the right "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," is exclusively within the province of Congress, and that any State statute which undertakes to impede, burden, or regulate such commerce is unconstitutional and void. Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; License Cases, 5 How. (U. S.) 504, 12 L. Ed. 256; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; American Express Co. v. Iowa, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417; Adams Express Co. v. Iowa, 196 U. S. 147, 25 Sup. Ct. 185, 49 L. Ed. 424; Vance v. Vandercock Co., 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100; Bowman v. C. & N. Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct.

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664, 42 L. Ed. 1088; Lord v. Goodall, N. P. S. S. Co., 102 U. S. 541, 26 L. Ed. 224; Pacific Coast S. S. Co. v. R. R. Commissioners (C. C.) 18 Fed. 10; Hanley v. Kansas City Ry. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333.

We do not think the fact that the liquor in question was brought from Kentucky to Cincinnati by the consignor, and there shipped to the consignee in Kentucky, in any wise changed the legal complexion of the transaction from one of legitimate interstate commerce, or that it had any tendency to bring it within the purview of a State statute. In the case of Heyman v. Southern Ry. Co., 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, the Supreme Court of the United States held that the common carrier was compelled to carry liquor from one state into another when it was tendered for transportation in the regular course of business and was bound to deliver it to the consignee, and that no state law could be applied until the liquor had been actually delivered into the possession of the consignee. In the case of Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. E. 1088, it was held that, where liquor was shipped from Illinois into Iowa, the statutes of the latter state could in no wise control the transaction in transit or before it was delivered to the consignee. In the case of Lord v. Goodall, N. P. S. S. Co., 120 U. S. 541, 26 L. Ed. 224, it was held that where goods were shipped from one point in a state to another point in the same state, by means of coastwise navigation on the high seas, the shipment was one of interstate commerce, and beyond regulation by the state In Pacific Coast S. S. Co. v. R. R. Commissioners (C. C.) 18 Fed. 10, Mr. Justice Field said: "To bring the transportation within the control of the State, as part of its domestic commerce,

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the subject transported must be within the entire voyage under the exclusive jurisdiction of the State" And in Hanley v. Kansas City Ry. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, the Supreme Court, after quoting with approval the language of Mr. Justice Field above stated, held that a shipment from one point in Arkansas to another point in that State by a continuous journey by rail, but which in the course of transportation passed out of the State of Arkansas into the Indian Territory, and then back again into Arkansas, was interstate commerce, and could not be regulated or controlled by legislation of the state of Arkansas.

The question of the shipment on the part of the consignor being a trick or device to evade the local option laws of Kentucky has no place in the transaction, so far as the common carrier is concerned. It cannot be a trick or device inimical to law to do that which the carrier not only had a right to do, but which it was under law bound to do. As a common carrier of interstate commerce, it could not refuse the shipment. So far as it was concerned, the State had no power to regulate its business, and it could not be said to violate by trick or device laws which could have no application to its business or control thereof. It was therefore immaterial whether the carrier knew, or did not know, that the commodity presented for transportation was malt liquor, or that Boyle county was a local option district. The Supreme Court of the United States, since the case of Brown v. Maryland, 12 Wheat. (U. S.) 435, 6 L. Ed. 678, has held that spirituous, vinous, and malt liquors are legitimate subjects of interstate commerce, and beyond the control of State laws when constituting a part of such commerce.

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The evidence in this case establishing beyond question that the shipment for which the appellant was indicted was interstate commerce, it was entitled at the close of the testimony for the State to a peremptory instruction to find it not guilty, and the trial court erred in overruling the motion for such an instruction.

The foregoing reasoning, however, has no application to the consignor brewing company, and we express no opinion as to the validity of its action in the premises.

The judgment is reversed for proceedings consistent with this opinion.

CASE 67.—MOTION BY A. B. CORNETT AGAINST A. J. ASHER, IN THE COURT OF APPEALS, TO DISMISS THE APPEAL AND DISCHARGE THE SUPERSEDEAS.—October 4.

Asher v. Cornett

Motion denied and a petition for a rehearing overruled.

Appeal—Supersedeas.—Where the circuit court renders a default judgment, and at a later term overrules a motion to set aside such judgment and grant a new trial, the appeal then granted by the circuit court is only from the judgment denying a new trial, and the supersedeas then issued by the clerk thereof, on the execution of the supersedeas bond before him, does not prevent execution on the default judgment, such court, under Civ. Code Prac., section 734, not having jurisdiction to grant an appeal from its judgment, except at the term at which it was rendered, and the clerk of such court having no authority to accept a supersedeas bond or issue a supersedeas as to

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such judgment, no appeal therefrom having been granted by such court; section 759 providing that the bond must be executed before the clerk of the court granting the appeal.

N. J. WELLER attorney for appellant.

JAMES H. JEFFRIES for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Overruling motion to dismiss appeal.

The question for decision now in this case is whether appellee's motion to dismiss the appeal granted by the lower court, and to discharge the supersedeas issued by the clerk of the circuit court, should prevail. Appellee sued appellant in assumpsit in the Leslie circuit court. A default judgment was rendered against appellant at the February, 1907, term of that court. No appeal was asked for, and none was granted by the court at that term. Appellant executed a supersedeas bond before the clerk of the Leslie circuit court and had issued a supersedeas staying proceedings upon the judgment on the 13th day of June thereafter. On the 26th day of June appellee filed notice, copies of the judgment and supersedeas bond, and moved this court to dismiss the appeal granted by the lower court and discharge the supersedeas. The papers filed did not disclose whether an order granting the appeal had been made by the circuit court. In this state of the record the court entered this order: "It appearing from the record that no appeal was granted before the execution of the supersedeas, the clerk was not authorized to issue a supersedeas or to accept bond. It was void. There is no necessity for quashing it, nor has the court power to do so in the present state of the record. Motion overruled." It now appears from

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the complete record filed in the case that at the April term, 1907, of the Leslie circuit court, appellant entered a motion to set aside the judgment rendered at the February term and to grant him a new trial of the action. Upon hearing, that motion was overruled, and from the judgment refusing the new trial appellant was granted an appeal to this court. It is insisted now that the appeal so granted was an appeal from the default judgment rendered at the February term, and that the clerk of the circuit court was therefore authorized to accept the bond and issue the supersedeas.

The circuit court has not the jurisdiction to grant an appeal from its judgment, except at the term of the court at which the judgment is rendered. Section 734, Civ. Code Prac. An appeal granted by the circuit court at a term subsequent to the one at which the judgment was rendered is void. American Accident Co. v. Reigart, 92 Ky. 142, 17 S. W. 280, 13 Ky. Law Rep. 442. We construe that the order granting the appeal in this case has relation alone to the judgment rendered at the term of the court during which the appeal was allowed, to-wit, from the judgment of the April term of the court refusing a new trial of the action. A judgment vacating a former judgment, or refusing to vacate a former judgment and to grant a new trial, is final, and may be appealed from. McCall v. Hitchcock, 7 Bush, 615; Id., 9 Bush, 66; Pague v. O. & K. Railroad, 1 Ky. Law Rep. 399. By section 748 of the Civil Code of Practice, a supersedeas shall not be issued until the appellant causes to be executed before the clerk of the court which rendered the judgment, or the clerk of the Court of Appeals, with sufficient sureties, a bond to the effect that appellant shall pay to the appellee all costs and damages that shall be

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adjudged against appellant on the appeal, and also to perform and satisfy the judgment appealed from if it should be affirmed. But by section 759 of the Civil Code of Practice it is provided: "The bond must be executed before the clerk of the court rendering the judgment if the appeal be granted by that court. In other cases it must be executed before the clerk of the Court of Appeals." Now, as there has not been an appeal granted by the Leslie circuit court from the judgment rendered at its February term, 1907, the clerk of the Leslie circuit court was not authorized to accept a supersedeas bond or to issue a supersedeas staying proceedings upon that judgment. Jones v. Green, 12 Bush, 127. As a statutory bond the bond is void, and appellee is not entitled to damages on it as a statutory bond. American Accident Co. v. Reigart, supra. Whether it is valid as a common-law bond is not here for determination. Spooner v. Best, 8 Ky. Law Rep. 185. Until an appeal is granted by the clerk of this court and a supersedeas bond executed before and a supersedeas issued by such clerk, appellee is entitled without action by this court to have an execution issued upon the judgment rendered at the February term, 1907, of the Leslie circuit court. Appellant may prosecute an appeal yet from the judgment last alluded to, but it must first be granted as required by section 734 of the Civil Code of Practice.

The petition for rehearing is overruled.

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CASE 68.—PROCEEDINGS BY THE COMMONWEALTH BY THE AUDITOR'S AGENT TO ASSESS A BANK DEPOSIT AS OMITTED PROPERTY.—October 9.

Commonwealth, by, etc., v. Wathen

Appeal from Marion Circuit Court.

I. H. THURMAN, Circuit Judge.

From a judgment dismissing the proceedings the Commonwealth appeals—Reversed.

Taxation—Bank Deposits.—While a bank may credit a customer's deposit on his overdue paper held by the bank, the money belongs to the customer, and is subject to his checks until the bank exercises this right; and, until this is actually done, the money is taxable in the depositor's hands as if he owed nothing to the bank.

JOSEPH SOLINGER for the Commonwealth.

J. P. THOMPSON for appellee.

OPINION OF THE COURT BY JUDGE BARKER—Reversing.

This is a proceeding, commenced by the auditor's agent, to assess as omitted property certain amounts of money belonging to appellee and alleged to have been on deposit to his credit in the Farmers' National Bank of Marion on assessment day in the years 1901, 1902, 1903, 1904, and 1905, respectively. The evidence shows, without contradiction, that appellee had on deposit to his credit on the 1st day of September, 1904, the sum of $2,169, and on the 1st day of Sep-

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tember, 1905, the sum of $1,044; that this money was not returned by the appellee for assessment, and it was not assessed for the years named, either as his property or the property of the bank; that, at the time this money was on deposit to the credit of the appellee, the bank held his notes, due on demand, for sums aggregating much more than the amount of the deposit. Upon these facts being made to appear, the court below dismissed the proceedings, for the reason, it is said in the briefs, that the bank had the right to credit the notes by the amount of the deposit, and therefore the money was to be considered as belonging to the bank, and not to the depositor. The soundness of this ruling is the question for adjudication.

The Constitution requires all property in this State not specifically exempted from taxation to be assessed at its fair cash value. It is conceded that the property in question is not exempt from taxation by the terms of section 170 of the Constitution. Therefore it must be assessed, by the terms of section 172, against either the appellee or the bank. It is admitted that it has not, for the years involved here, been assessed as the property of either. In the case of Deposit Bank of Owensboro v. Daviess County, etc., 102 Ky. 214, 19 Ky. Law Rep. 248, 39 S. W. 1041, 44 L. R. A. 825, on the subject of taxation of deposits as the property of the bank, it was said: "The banks are not required to pay tax on the money deposited with them by their customers, or on assets which represent it. Owing to the particular character of the business which they conduct, they are quasi trustees of their depositors, and under the law the depositors are required to pay the tax on the money so deposited." This language was cited with ap-

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proval in the case of Commonwealth v. Bank of Commerce, 118 Ky. 547, 26 Ky. Law Rep. 407, 81 S. W. 679. The question as to whether deposits should be taxed against the banks or the depositors is so thoroughly considered and settled in these cases that it is not necessary to rediscuss the principle here.

But it is insisted that, because the bank held the depositors' notes for more than the amount of the deposit, and could, if that course had seemed desirable, have credited the notes with the amount of the deposit, and thus absorbed it, therefore the deposit should not be considered the property of the depositor. Admitting, as we do, the proposition that banks may credit any money on deposit belonging to their debtors on any overdue paper of the debtors held by them, the corollary sought to be drawn from this principle by appellee is not fairly deducible from the premises. In the first place, the notes held by the bank were not due. The evidence shows they were due on demand, and no demand seems to have been made. The deposit could not have been credited on paper not then due. But we do not rest this case upon so narrow a principle as the difference between a note already due and one which is due on demand, although there is a plain distinction between them. Therefore, passing this proposition, we are of opinion that, while a bank has a right to credit the deposit of its customer on any overdue paper of the customer which it holds, the money belongs to the customer, and is subject to his checks until the bank exercises this right; and until this is actually done the money belongs to the depositor for fiscal purposes, and is taxable in his hands just as if he owed nothing to the bank. If this be not sound, then it must follow that the deposit, although not exempted from taxation,

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was not taxable at all, although the Constitution required it to be taxed. It would be property which, for fiscal purposes, belonged to nobody. Such a conclusion cannot be tenable. The bank had not exercised its right to credit the deposit on the notes of the appellee, and it necessarily follows, from what we have said before, that it was assessable as the property of appellee on the 1st day of September in the years 1904 and 1905.

For the reasons indicated, the judgment is reversed, for further proceedings consistent herewith.

CASE 69.—ACTION BY WILLIE SKIDMORE AND OTHERS AGAINST THE CUMBERLAND VALLEY LAND CO. AND OTHERS, INVOLVING INFANTS' INTEREST IN LAND.—October 9.

Skidmore, etc., v. Cumberland Valley Land Co., etc.

Appeal from Harlan Circuit Court.

M. J. Moss, Circuit Judge.

From a compromise judgment the guardian ad litem of the infants appeal—Affirmed.

Guardian and Ward—Care of Ward's Estate—Compromise—Conveyance of Land.—Under Ky. Stats., 1903, section 2030, providing that a guardian, with leave of the court, may compromise any controversy concerning the lands of his ward, when the interest of the ward will be subserved thereby, where a suit to determine the interest of wards is compromised, the court has authority to order a conveyance of the interest

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conceded by the compromise to be in the wards and to be conveyed for a money consideration under its terms.

G. A. EVERSOLE, guardian ad litem for appellants.

We contend that section 2030 of the Kentucky Statutes repeals the power given in the General Statutes to convey the land of their wards by compromise, if indeed that power ever existed.

AUTHORITIES CITED.

Civil Code, sections 489, 490 and 491; Ky. Stats., sections 2034 and 2039; Walker v. Smyser, 80 Ky., 620; Henning v. Harrison, 13 Bush, 723; Meddes v. Bull, 13 Ky. Law Rep., 767; Goldsmith v. Heiatt, 28 Ky. Law Rep., 741; Wormack v. Loar, 11 Ky. Law Rep., 6; Bill v. Burgess, 15 Ky. Law Rep., 41.

Sampson & Sampson attorneys for appellee.

By section 2030, Ky. Stats., a guardian is empowered to "settle or compromise any controversy concerning the lands of his ward when the interest of the ward will be subserved thereby." This is to be done with leave of the court. There is no limit as to how the same is to be made or the terms of such settlement.

If with leave of the court he can settle he must also have power to consummate that settlement. If it be necessary in carrying it out to convey lands of the infant there must be some authority to do that and vest the title.

This is not a proceeding to sell the infants land, but to settle a controversy whereby the infants get, instead of their lands, a sum of money which is shown to be its full value. Walker v. Smyser, 80 Ky., 628.

OPINION OF THE COURT BY JUDGE BARKER—Affirming.

There was pending in the Harlan circuit court a suit between Mary Jane Skidmore and the Cumberland Valley Land Company, in which was involved, among other things, the validity of the former's claim to own an undivided interest in a tract of 600 acres of land in Harlan county, Ky. There were

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other issues in the case, such as claims of damages for trespass in cutting trees, etc., but the main issue, so far as the case in hand is concerned, was her claim to be the owner of an undivided interest in the land. There can be no question that the litigation was genuine and the controversy a serious one to her. During the pendency of this litigation, she died, intestate, leaving four children, the infant appellants, Willie Skidmore, Robert Skidmore, Victor Skidmore, and Theodore Skidmore, her only heirs at law. Afterwards J. F. Skidmore, the husband of Mary Jane Skidmore, was appointed and qualified as guardian of his children, the appellants, and the case was regularly revived in their names as heirs at law of their mother. The litigation then continued for some time. Afterwards the father and guardian of the infants entered into an agreement of compromise with the appellee company, by which it was agreed that the infants were entitled, so far as their rights in the land were concerned, to the claim as set up and sought to be maintained by their mother, Mary Jane Skidmore, and that they should receive this interest in money; the land being valued at $15 per acre. We do not set out the terms of the compromise minutely; it being conceded by the guardian ad litem, who prosecutes this appeal, that it is a fair one so far as the infants are concerned, and that they, under its terms, receive the full market value of the land claimed by their mother if it was free from any controversy whatever. After this compromise was agreed upon, the guardian, and the children by him, filed a petition in the case they were litigating with the appellee, setting forth the terms of the compromise, that the issues involved were many and doubtful, and that their best interest would be subserved by the compro-

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mise in question being carried into effect through the judgment of the court. Some evidence was taken on the merits of the compromise, and, the case having been regularly submitted, a judgment was entered approving its terms, and directing the commissioner of the court to convey whatever interest the infant appellants had in the land to the appellee. As said before, the guardians ad litem, who prosecutes this action, does not question the merits of the compromise, but challenges the jurisdiction of the court to carry it into effect as was done in this case. Section 2030, Ky. St. 1903, is as follows: "Guardian shall discharge the liabilities of the ward for the debts of the ancestor out of his personal estate, and when the personal estate, with the rents of the real estate is not sufficient therefor, he may, by petition to a court of his county having equity jurisdiction, obtain leave to sell land for that purpose. He shall also receive and sue for the debts and demands owing to the ward, defend actions against him, and, with leave of the court, may compound a debt or demand, or settle or compromise any controversy concerning the lands of his ward when the interest of the ward will be subserved thereby." It will be observed that the language of the foregoing statute, in so far as it relates to the subject in hand, authorizes, the guardian, with the approval of the chancellor, to "settle or compromise any controversy concerning the lands of his ward when the interest of the ward will be subserved thereby." This is a very broad power, and is conferred upon the guardian to enable him thoroughly to protect the interest of his ward. The protection of the infant against the disloyalty or negligence of the guardian is contained in the provision which requires the approval of the chancellor before the

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compromise can be carried into effect. Now, it is obvious that, in order to settle or compromise all controversies concerning the lands of infants, it must necessarily often happen, as in the case at bar, that the claim of the infant to the land in question must be released and conveyed to the opposing claimant, and, when this happens, the statute would be entirely nullified if the court did not have a right to carry the compromise into effect by a conveyance of whatever claim the terms of the compromise conceded to the infants. This is a most beneficient statute, and but for it or some similar enactment, the interest of infant claimants would often be swallowed up and lost in the precarious chances of litigation. We do not think the absence from the statute of words expressly authorizing a conveyance to be made of the infant's property militates against the conclusion at which we have arrived. Where a power is expressly and definitely given, it embraces by implication all powers which are necessary to the effectual execution of that expressly given. Now, while the statute under consideration does not say, in express language, that the guardian, or the chancellor through his commissioner, may convey the interest of an infant in land involved in litigation and which is the subject of compromise, the power to compromise an adverse claim is expressly and certainly given; and we think the power to convey, in order to effectuate the compromise, is fairly implied in the authority to make it. Any other construction than this must often jeopardize the substantial interest of infants in lands involved in litigation. The case at bar is a fair sample of what might happen in such cases if the position of the guardian ad litem is sound. By the compromise made, the infant appellants receive sub-

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stantially everything their mother claimed, but take it in money, instead of the actual land. If the litigation is to proceed without compromise, it may peradventure happen that an adverse decision to their interest would be rendered, and in the end they would receive nothing. Certainly it is to their material and substantial interest that this compromise should be made. It is one that any prudent man acting for himself would make in his own behalf, for it eliminates all chance of a total loss by an adverse judgment.

It is inconceivable how the statute could be effectually enforced if there is not implied in the power to compromise an adverse claim in land the power to convey the interest of the infant therein. This proceeding is not under chapter 14, tit. 10, Civ. Code Prac., relative to the sale of the land of infants. There it must be conceded the power to sell and convey the estate of an infant in land must be expressly given in order to clothe the court with jurisdiction to sell. But here is a case where the estate of the infants is denied and is a subject of active and adverse litigation. That they have any estate at all in the land is a question to be determined on final judgment, and is at least doubtful. These facts bring it within the purview of the statute above quoted; and this statute, as we have said above authorizes the release or conveyance by deed of their interest in the subject of the controversy in order that a wholesome and beneficial compromise may be effectuated.

Every interest of the infants seems to have been safeguarded in the proceedings leading up to the judgment approving the compromise and ordering a conveyance by the commissioner of the interest of

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the infants in the land in question, and we are therefore of opinion that the judgment should be affirmed, and it is so ordered.

CASE 70.—ACTION BY AMERICAN TOBACCO CO. AGAINST PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. FOR THE LOSS OF TOBACCO BY BURNING OF CAR.—October 10.

Pittsburg, C., C. & St. L. Ry. Co. v. American Tobacco Co.

Appeal from Jefferson Circuit Court.

(C. P. Branch 1 Div.) EMMET FIELD, Judge.

Judgment for plaintiff, defendant appeals—Affirmed.

1. Carriers—Loss of Goods—Delivery to Carrier.—A carrier's liability as insurer for a loss of goods begins when the carrier has actually received the goods as a carrier for immediate shipment.
2. Same—Bill of Lading—Scope.—A bill of lading issued by a carrier is only prima facie evidence of the receipt of the goods described in it, being open to explanation, and imposing no liability on the carrier as an insurer until the goods are actually received by the carrier.
3. Same—Evidence of Delivery.—Evidence held to show that tobacco was delivered to a carrier for transportation before its destruction by fire, so as to charge the carrier as an insurer with liability for its loss, though no notice was given to the carrier after the loading had been completed.
4. Same—Delivery to an Acceptance by Carrier.—When goods designed for immediate shipment are placed in a condition to be carried, in the usual place of loading, in accordance with

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the custom of dealing between the parties, with the carrier's knowledge of the fact and purpose, or at the place of loading designated by the parties, there is both a delivery to and an acceptance by the carrier.

C. H. GIBSON for appellant.

POINTS AND AUTHORITIES.

1. A bill of lading issued by a common carrier is only prima facie evidence of the receipt of the goods described in it. It is open to explanation, and imposes no liability on the carrier unless the goods are actually delivered. Elliott on Railroads, section 1419; A. & E. Encyc. of Law, 2d Ed., vol. 5, pp. 187-8; Hutchinson on Carirers, sections 122, 123.

2. The delivery to the carrier is not complete until notice is given that the shipment is ready for immediate movement and shipping directions are given. Hutchinson on Carirers, sections 69-99; Railroad Co. v. Smyser, 38 Ill.; Basnight v. R. R. Co. (S. Car.), 16 S. E., 323; Tate v. R. R. Co., 78 Miss., 842.

3. A car was switched to a private siding connected with the tracks of an intervening carrier to be loaded and switched back to appellant for carriage over its line. A bill of lading was issued just before or at the time the car was being loaded. Before the switching line was given the customary notice that the car was ready to be moved and before any shipping directions were given, the car and contents were destroyed by fire. Under the authorities above cited there was no such delivery to appellant as imposed on it the duties or liabilities of a carrier.

4. Appellant was bound to furnish the car, and being unable to do so except through an independent switching line, in the selection of which it had no choice, the switching line was not appellant's agent in the matter, and appellant's responsibility could not attach until the car was returned to its actual possession.

AUGUSTUS E. WILLSON, attorney for appellee.

ARTHUR E. HOPKINS of counsel.

There can be no dispute that the bill of lading took effect, at the latest, two hours after the fire. The completing the loading of appellant's car and sealing it at the usual place of delivery of such cars at that warehouse to appellant was, therefore, a

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complete delivery, and the bill of lading went into effect and was in full force and effect and the tobacco at appellant's risk and under its control and out of appellee's control, two hours or more before the fire, and therefore the loss was appellant's loss.

2. As the bill of lading is prima facie evidence of delivery and was in our possession, the burden as to non-delivery shifted to the appellant to prove affirmatively that the delivery was not complete before the tobacco was destroyed, and there is not a scintilla of evidence to show that. On the contrary the evidence is clear and undisputed that it was complete for more than two hours before the fire, and it follows that the evidence of delivery being undisputed it was the duty of the court to instruct the jury to find for appellee.

3. The shipper performed his whole duty when this car was loaded and sealed and the bill of lading was in its possession. If it failed to do all, the carrier should have alleged and proved the failure, to overcome the prima facie evidence of the bill of lading, and it did neither.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

Appellee had certain hogsheads of tobacco stored at the warerooms of the Union Warehouse Company in Louisville. A private railroad switch, not owned nor controlled by appellant, extended alongside the warehouse. Appellee notified appellant of its desire to ship the tobacco over appellant's line of road from Louisville to Chicago, and requested that a car for the purpose be placed on the siding at the warehouse to receive it. Appellant placed the car as requested. The warehouse company was notified by appellee to load the tobacco. After the car was placed, the warehouse company put the tobacco on the platform of its warehouse alongside the car, for the purpose of loading it as soon as its laborers could conveniently attend to it. Appellee was notified that the tobacco was loaded, whereupon it prepared a bill of lading in the customary form and presented it to appellant's

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city office for signature. Appellant signed the bill of lading between 12 o'clock noon and 1 o'clock p. m. of that day, which was about one hour in advance of the actual loading of the tobacco. The tobacco was loaded about half past 1 or 2 o'clock of that day, and the car was sealed ready for transportation. The fact is the siding was under the control of the Kentucky & Indiana Railroad & Bridge Company, a distinct corporation, which transferred cars between different points in the city of Louisville and across the Ohio river by means of its own tracks and bridge in connection with the tracks of connecting railroads. About 4 o'clock p. m. of the day on which the tobacco was loaded, and before the car was removed, a fire occurred in the neighborhood, which extended to the warehouse property and burned the car. The tobacco was entirely destroyed, or so materially damaged as that it was worthless. In this suit by the shipper against the carrier, who had undertaken to carry the tobacco, to recover for its loss, the question for decision was whether there had been such a delivery to the carrier as that its responsibility as an insurer of the freight attached. The facts were not disputed. Whereupon the court peremptorily instructed the jury to find for the shipper.

A bill of lading issued by a common carrier is only prima facie evidence of the receipt of the goods described in it. It is open to explanation, and imposes no liability on the carrier as an insurer, unless the goods are actually delivered. Elliott on Railroads, section 1419; Hutchinson on Carriers, sections 121-123. If the fact had been that the goods had been destroyed by fire before they were actually delivered to the carrier, as, for example, in this case, while they were still on the platform of the warehouse, the

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carrier would not have been liable as an insurer, notwithstanding its receipt evidenced by the bill of lading. Its liability depends upon the fact as to whether it has actually received the goods as a carrier for immediate shipment. Appellant contends that the goods were not in its custody until they had reached its own line of road, or in no event until the goods had been loaded upon its car ready for shipment and it had been notified of the fact. Railroad v. Smyser, 38 Ill. 354, 87 Am. Dec. 301, Basnight v. Railroad Co., 111 N. C. 592, 16 S. E. 323, and Tate v Railroad Co., 78 Miss. 842, 29 South, 392, 84 Am. St. Rep. 649, are relied upon. We do not deem it material that appellant did not own nor control the siding where it had placed its car to receive the tobacco. It had assumed to receive it at that point, and had caused its car to be placed there for that purpose. It thereby constituted the warehouse side track the place for the reception of the freight, and is bound by the fact, as much so as if it had been upon its own siding or at its regular freight station in the city. Certain kinds of freight can be conveniently loaded only at points not freight depots. Where the parties adopt such point as the proper place for the loading of such freight, and the goods are actually loaded onto the cars placed at that point by the carrier for that purpose, the result, as fixing the carrier's liability upon its contract to safely carry and deliver the goods, is nowise different from what it would be if it had received goods into its freight depot for the same purpose. Indeed, the receiving of the goods into the freight depot is not essential to fixing the carrier's liability at all. It is the receipt at any point for the purpose of carrying them as freight that

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initiates the liability for their safety. If the carrier and its shippers agree expressly, or tacitly by custom, that the goods be delivered to the carrier in its cars upon private sidings, the carrier, after so receiving them, has them in possession for transmission as freight. The Kentucky & Indiana Bridge Company in this case is deemed the agent of appellant carrier for the purpose of receiving the goods and hauling them to appellant's own line of railroad.

Nor do we find merit in appellant's contention that it was not notified of the loading of the tobacco after it was loaded. It was notified of the shipper's purpose to load it at the warehouse, and placed its car there to receive it. It signed the bill of lading evidencing its receipt, which was of itself notice that the car had been or was being loaded. When the car was loaded and sealed, a further notice of that fact was not necessary to apprise the carrier of what it already knew, namely, that it was ready for shipment; for notice might be given in advance, or might even be waived. When the tobacco was actually delivered into the carrier's car in accordance with the bill of lading, its physical delivery to the carrier for the purpose of transportation was completed. The prima facie character of the bill of lading became absolute upon proof of the subsequent actual delivery in accordance with its terms, the delivery being in such close proximity to the issuing of the bill as to be for all practical purposes a part of a single transaction. The doctrine that an acceptance by the carrier is essential to the creation of its contract liability is sound and undisputed. It would be most unjust if the shipper could deposit his goods in the carrier's car without notice to the latter, and fix a heavy lability upon it as an absolute insurer, while

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it was ignorant of the fact that it was expected to take charge of the goods for shipment. But the acceptance need not always be shown to have been by an express act. It may be presumed, when the goods are left in the usual place in accordance with the contract or custom of the carrier to so receive them. Hale on Carriers, 68. The cases relied on by appellant, while bearing many of the features of the one in hand, show that control over the goods had not been parted with by the shipper, or that something else was to be done by the carrier before the shipment was to begin, such as counting or weighing the goods. But, when goods are designed for immediate shipment, the placing them in a condition to be carried at the usual place of loading, with the carrier's knowledge of the fact and purpose, or at the place of loading designated by the parties, constitutes a delivery to the carrier and acceptance by it. Railroad Co. v. Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674; Railroad Co. v. Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202.

It was shown in the case that the custom of dealing between the parties was followed. The goods were delivered in the same manner, at the same or similar place. The bill of lading was signed simultaneously or in advance of the loading. The previous custom had been for the carrier, without further notice, to have the car transported to its own line by the bridge company's locomotives and servants in the usual course of their business. The plan usually followed was probably a feature and incident of the conditions existing in cities of the size of Louisville, where a number of railroads center, having different warehouses and depots, and where there are many manufacturing plants and public warehouses situated upon

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private sidings. The practice is a practical and reasonable solution of the needs of the situation, worked out by the common sense of those dealing in such matters. There appears every reason for fixing the carrier's liability to begin at the usual or actual place of its receiving consignments of freight, as though they were received at the carrier's own depot, and presuming its acceptance from its custom and knowledge of the particular transaction, while no just reason is advanced to the contrary.

The action of the circuit court and its judgment being in conformity to these views, the judgment is affirmed.

CASE 71.—ACTION BY W. H. HERNDON'S ADM'R AGAINST THE LOUISVILLE & N. R. R. CO., FOR DAMAGES FOR CAUSING THE DEATH OF PLAINTIFF'S INTESTATE.—October 10.

Louisville & N. R. R. Co. v. Herndon's Admr.

Appeal from Hopkins Circiut Court.

J. F. GORDON, Circuit Judge.

Judgment for plaintiffs, defendant appeals.—Affirmed.

1. Master and Servant—Railroad—Death of Brakeman—Negligence—Rules.—Decedent, a brakeman in defendant's employ, was directed to assist in taking out cars from a siding, and while between two cars, standing six or eight feet apart, inspecting the coupling air hose, was killed by other cars being shoved against one of the standing cars with great

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force, and without notice to decedent. Held, that defendant was negligent in permitting such operation, notwithstanding an unpublished rule or custom of the company that the switch engine had the right of way over all others in the yard, and that it was not the duty of those in charge of it to give notice of its movements to other crews inthe yard, who were required to protect themselves.

2. Administrators—Public Administrator—Appointment—Corporations.—Under Stats. 1903, section 457, providing that the word "person" may extend and be applied to corporations, the court was authorized by section 3903, providing for the appointment of some discreet, fit person to act as public administrator, to appoint a corporation to that office, which was organized under section 606, providing that such corporations are authorized to act as guardian, executor or administrator.
3. Same—Right to Sue.—Where an action for death was brought by a corporation which had been appointed public administrator, and the petition, in addition, alleged that intestate died a resident of H. county, Ky., and that on a specified day plaintiff was appointed by the county court administrator of his estate, and thereupon qualified as such administrator as required by law, and had acted as such ever since, etc., such allegation sufficiently showed a special appointment of plaintiff as administrator of decedent's estate.
4. Same—Qualification.—An allegation that plaintiff had duly qualified as intestate's administrator raised a presumption that plaintiff had taken the necessary oath.
5. Pleading—Capacity to Sue—Demurrer.—Civ. Code Prac., section 92, provides that a special demurrer is an objection to a pleading which shows that the court has no jurisdiction of the defendant or of the subject of the action, or that plaintiff has no legal capacity to sue, and that such grounds of objection are waived unless specified by demurrer thereto, except the objection to the jurisdiction of the court over the subject of the action. Held, that a general demurrer to a petition by an administrator for wrongful death was insufficient to raise the objection that it had not sufficient capacity to sue.
6. Courts—Special Judges — Constitutional Provisions. — Const. section 136, declaring that the General Assembly shall provide by law for holding circuit court whenever for any cause the judge shall fail to attend, or cannot properly preside, authorizes the General Assembly to provide for a special judge in the case named, and does not limit its right to provide for special judges in other emergencies, and was therefore not violated by Acts 1906, p. 249, c. 23, amending

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Ky. Stats., 1903, section 964, authorizing the holding of a special term in another county of a judicial district while a regular term was being held in a county of the same district.

7. Statutes—Expression of Subject in Title—Act Relating to Courts.—Acts 1906, p. 249, c. 23, is entitled an act to amend Ky. Stats., 1903, section 964, by adding thereto subsection "a," called section 964a. The added section authorizes a special term of court to be held in another county of a judicial district when a regular term is being held within the district, and an additional section, designated as "subsection 2," declares that the regular judge shall have the right when engaged in holding any regular or special term of court in any county to cause an appointment of a special judge under the act to hold any regular or special term of the circuit courts then about to be holden in any other county in such judicial district. Held, that the whole amendment, including the subsection, applied to the same subject, and that the amendment was not therefore invalid, as containing matter not expressed in the title.

8. Same—Partial Invalidity.—Such subsection 2 (page 2522, even if invalid, as not within the title, is separable, and does not affect the validity of the first section of the amendment.

9. Judges—Appointment—De Facto Judge—Objections—Waiver. —Where a special term at which a case was tried was regularly called by the circuit judge, and no objection was made to the assignment of the case for trial at that term, and no exception was taken to the action of the court in trying the case, the judge who presided was at least a de facto officer, and defendant could not thereafter object to the validity of his appointment.

BENJAMIN D. WARFIELD for appellant.

WADDELL & DEMPSEY of counsel.

POINTS DISCUSSED AND AUTHORITIES CITED.

1. The Kentucky Bank and Trust Co., a corporation, is not authorized by the laws of Kentucky to act as public administrator, in which capacity it is seeking to maintain this action. Art. 5, ch. 98, Ky. Stats., sections 3903-3908; this question was properly raised by appellant's general demurrers to the petition and amended petition. L. & N. R. Co. v. Brantley's Adm'r, 96 Ky., 297.

2. But even if the trust company might lawfully act as public administrator at all, it had no right so to act under the appoint-

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ment, or pretended appointment, of July 1, 1901, for a longer period than four years thereafter, and was functus officio on Aug. 30, 1905, when it was attempted to refer decedent's estate to it for administration, and on September 4, 1905, when this action was commenced, and at all times since then. Section 107, Const. of Ky., section 3904, Ky. Stats.; Comrs. of Sinking Fund v. George, etc., 20 Ky. Law Rep., 938; Campbell v. Dodson, 23 Ky. Law Rep., 510; Commonwealth v. Smith, 14 Ky. Law Rep., 573; Offutt v. Commonwealth, 10 Bush, 212; Lord Arlington v. Merricke, 2 Wms. Saund., 403; Hassell v. Long, 2 Maule & S., 368; Commonwealth v. Fairfax, 4 Hen. & M., 208; Tyler v. Nelson, 14 Gratt., 214; Munford v. Rice, 6 Munf., 81; Williams v. Miller, Kirby (Conn.), 192; Cuthbert, Adm'r, v. Huggins et al., 21 Ala., 349; State ex rel. Polk v. Galusha, Secretary of State, 104 N. W., 197; Ky. Const., section 228; Ky. Stats., sections 3753, 3756, 457; Morgan v. Vance, 4 Bush, 323; Creighton v. Commonwealth, 83 Ky., 142; 23 A. & E. Eucyc. of Law, 415; State v. Brewster, 44 Ohio State —, 9 N. E. 849; Atchison, County Judge, v. Lucas, 83 Ky., 451.

3. While appellee alleges that he was appointed administrator of decedent's estate, the copy of order of the Hopkins county court, made part of petition, shows the estate was "confided" to appellee as "public administrator." It is well settled that where there is a variance between the allegations of the petition and the exhibit itself, as to what the exhibit contains, the exhibit controls. Boyd, etc., v. Bethel, 10 Ky. Law Rep., 470.

4. The trial court erred in admitting much incompetent testimony, particularly as to alleged customary rules observed by employes in the Guthrie yards, of which there is no pretense appellant had any knowledge, or that it consented thereto, and which so-called customary rules were in contravention of or not recognized by appellant's printed rules for the government of its transportation department. L. & N. R. Co. v. Scanlan, 22 Ky. Law Rep., 1404; Id. v. Logsdon, 114 Ky., 746; Labatt, Master and Servant, sections 35, 210, 211; James v. N. P. R. Co., 48 N. W., 783; A., T. & S. F. R. Co. v. Carruthers, 43 Pac., 230; Crowe v. N. ., C. & H. R. R. Co., 70 Hun., 37, 23 N. Y. Supp., 1100; Rutledge v. M. P. R. Co., 123 Mo.,131.

5 The court erred in permitting appellee to prove rule 130 of appellant's book of rules, as establishing the standard of legal care due to decedent by his co-employes, that being a higher degree of care than the law requires. Lake Shore, etc., R. Co. v. Smith, 173 U. S., on p. 679; L. & N. R. Co. v. Collins, 2 Duvall, 114; Id. v. Robinson, 4 Bush, 507; Greer v. L. & N. R. Co., 94 Ky., on

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p. 178; Volz & Chesapeake, etc., R. Co., 95 Ky. 188; Cincinnati, etc., R. Co. v. Palmer, 98 Ky., on p. 389; Dana & Co. v. Blackburn, 28 Ky. Law Rep., 695

6. Whether or not it was safe for the switch engine to throw cars in on the track on which the cars about which decedent was working stood, was a question for the jury and not for opinion evidence of witnesses. L. & N. R. Co. v. Milliken's Arm'x, 21 Ky. Law Rep., on p. 492; L. & N. R. Co. v. Mulloy's Adm'v, 28 Ky. Law Rep., on p. 1119.

7. Appellee does not contend appellant was negligent except as to the switch crew. There was no evidence of negligence on the part of such crew, and the court erred in submitting that question to the jury to "guess away" appellant's rights. L. & N. R. Co. v. Wathen, 22 Ky. Law Rep., 85; Langhorn et al. v. Nelson, 99 S. W., 223; Louisville Gas Co. v. Kaufman-Straus Co., etc., 105 Ky., 131-156.

8. Instructions 1, 2 and 5 given by the court on its own motion were very erorneous and prejudicial, especially in submitting issues there was no evidence to support, and in authorizing punitive damages. Covington Saw Mill & Mfg. Co. v. Drexilius et al., 27 Ky. Law Rep., 903-7; Lexington Ry. Co. v. Fain, 25 Ky. Law Rep. 2243; McHenry Coal Co. v. Sneddon, 98 Ky. 686; Southern Ry. Co. in Ky. v. Hawkins, by etc., 28 Ky. Law Rep., 364. To the same effect, see Lake Shore, etc., R. Co. v. Prentice, 147 U. S., 107; Cooley on Torts, 3d Ed., p. 1324; Pollock on Torts, star page 157; Mcak's Underhill on Torts Reduced to Rules, 74; Jaggard on Torts, 392; Sutherland on Damages, 3d Ed., 1080; Hutchinson's new work on Carriers, 3d Ed., section 1436; Rorer on Railroads, 869; Ray's Neg. of Imposed Duties, pp. 358, 966; Thompson on Neg., sections 7080-1; Sedgwick on Dam., vol. 1, p. 217n; Shearman & Redfield on Neg., vol. 2, section 748; Thomas' Negligence Rules, Decisions, Opinions, 898-9; Watson's Damages for Personal Injuries, sections 719, 722; 12 A. & E. Encyc. of Law, 2d Ed., 28; 13 Cyc., 105; L. & N. R. Co. v. Kingman, 18 Ky. Law Rep., 83; Southern Ry. Co. in Ky. v. Goddard, 28 Ky. Law Rep., 523; I. C. R. Co. v. Lence, decided February 27, 1907; Louisville & Portland R. Co. v Smith, 2 Duvall, 556; Kentucky Central R. Co. v. Dills, 4 Bush, 593; L. & N. R. Co. v. Sickings, 5 Bush, on p. 10; C. & C. Bridge Co. v. Lillard, 29Ky. Law Rep., 871.

JONSON & JENNINGS, attorneys for appellee.

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POINTS DISCUSSED AND AUTHORITIES CITED.

1. Duty of appellant to keep lookout for deceased. L. & N. v. Lowe, 66 S. W. 736, 80 S. W. 880, 25 Ky. Law Rep. 2317; C., N. O. & T. P. R. F. Co. v. Hill's Adm'r, 89 S. W. 523, 25 Ky. Law Rep. 530.

2. Duty to give signal. So. Ry. v. Otis' Adm'r, 78 S. W. 430, 25 Ky. Law Rep., 1686.

3. Contributory Negligence. So. Ry. v. Otis' Adm'r, supra.

4. Appellant cannot escape liability by showing observance of negligent custom.

5. Admission of evidence. (a) No error in admitting printed rules. (b) No error in admitting so-called customary rules. Ky. Cent. Ry. v. Carr, 43 S. W. 193, 19 Ky. Law Rep. 1172. (c) No error in admitting rule No. 130. (d) Evidence of Gioninni that it was dangerous for the switch crew to throw cars against those between which Herndon was.

6. Fellow Servant. L. & N. v. Lowe, supra; C., N. O. & T. P. R. R. v. Hill's Adm'r, supra.

7. Switch crew did not have right of way or right to kill Herndon if it did have right of way.

8. Peremptory Instruction was properly refused. Labatt M. & S., section 35; So. Ry. v. Otis' Adm'r, supra.

9. Instructions. Judd's Adm'r v. C. & O. Ry., 37 S. W. 842, 38 S. W. 880, 18 Ky. Law Rep. 747.

(a) Gross negligence instruction. Const., section 241; Ky. Stats., section 6; Link's Adm'r v. L. & N., 54 S. W. 184, 21 Ky. Law Rep. 1097; I. C. R. R. v. Coleman, 59 S. W. 13, 22 Ky. Law Rep. 878; C., N. O. & T. P. R. R. v. Cook's Adm'r, supra; So. Ry. v. Otis' Adm'r, supra; Burton v. I. C. R. R., 79 S. W. 231, 25 Ky. Law Rep. 1916; Ky. Cent. Ry. v. Carr, supra.

10. A corporation can be appointed public administrator. 7 Am. & Eng. Encyc. of Law, 733; 11 Id. 753 and n; Johnson v. Johnson, 88 Ky. 275, 11 S. W. 5; Coleman's Adm'r v. Parrott, 13 S. W. 525, 11 Ky. Law Rep. 947; Phalan v. Lou. Safety V. Co., 88 Ky. 24, 10 S. W. 10; Ky. Stats., sections 606, 611, 3904, 3903, etc.; Thompson Corporations, sections 11 and 5689.

11. Appellee held over as public administrator. Harrison v. State, 113 Ind., 434; State v. Compson, 34 Ore., 25; State v. Catlin, 84 Tex., 48; Com'rs Sinking Fund v. George, etc., 47 S. W. 779, 20 Ky. Law Rep. 938; Olsen's Adm'r v. Rice, 79 Ky., 244; Ky. Stats., sections 611 and 3904.

12. Appellee was at least a de facto administrator of decedent,

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and its acts as such were binding. Ky. Stats., section 611; Davis v. Connelly's Ex'rs., 4 B. M., 140.

13. General demurrer not proper practice to question appellee's capacity to maintain action. Coleman's Adm'r v. Parortt, supra.

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

Appellee's intestate was killed while in the employ of appellant as brakeman, and at work in its yards at Guthrie, Ky., February 9, 1905. The evidence shows, without contradiction, that when killed he was between two cars, standing six or eight feet apart, and was inspecting the coupling apparatus or adjusting the brake knuckle lock. This was in his line of duty as shown by oral evidence, and rules number 130 and 224 of appellant prescribing the duties of a brakeman and other employes. Rule number 224 reads as follows: "Rule 224. All employes are hereby instructed, each for himself, to examine so as to know the kind and condition of the draw-heads, drawbars, and coupling apparatus, and are prohibited from placing in a train a car with defective coupling until they have first reported its defective condition to the yard master, conductor, or proper person in authority. Sufficient time is allowed and must be taken by employes in all cases to make examinations." Rule 130 reads as follows: "Rule 130. Employes of every grade are warned to see for themselves, before handling or using them, that the cars, machinery and tools, which they are expected to handle or use, and the premises upon which they are expected to work, are in proper condition for the service required, and if not, to put them in proper condition, or see that they are so put before using them." The deceased was directed by the yardmaster at Guthrie to take the engine and crew and take out some freight cars that

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were situated on the north end of track No. 4 in the switchyard, and when killed was there in the performance of this duty. The switching crew with engine located at Guthrie yards, about 8 o'clock in the evening, moved south on track No. 3 or 5, either of which is about six feet from track No. 4; and while deceased, with his crew, were making up their train on track 4, kicked onto track 4, at the south end of the switchyard, two cars, and in a few moments afterwards either kicked or pushed three or five cars onto track 4. They stated that they set the brakes on one or two of these cars on the north end of them. There is no pretense that there was any notice or warning of any kind given to the crew, or any member of the crew, with which deceased was engaged, that the switch crew intended to place these cars into the south end of track No. 4. From the evidence this track was slightly downgrade to the north, and it is pretty certain, from the evidence, that these cars rolled or were shoved down track No. 4 and struck the cars standing thereon, which deceased's crew were preparing to take out, caught deceased between the cars, and crushed him.

The engineer under whom deceased was laboring testified that, after he backed onto track No. 4 and reached the cars that he was to pull out, he never moved his engine either backward or forward to the time that Herndon was killed; that he was in his cab with his head out of the window, looking back for signals, and saw some one with a lantern going in between the cars as though he was examining the couplings and adjusting the air hose. He could not tell at the time who this person was, for it was dark, but it turned out to be Herndon. He further stated that deceased went into the place where he was killed

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and remained from one to two minutes, when. without any notice or warning to him, the cars were shoved or rolled with such force as to shove his engine six or eight feet; that he checked it with the emergency brakes. The conductor testified that the deceased was performing his duty; that he passed along, examining the train and seals on the cars, and had passed deceased about a car length when the crash came; that he immediately returned, found deceased lying upon the ground under the cars, and on pulling him out he asked how it occurred. He could hardly speak, but he thought he understood him to say that he was fastening the air hose. He was carried to the hospital after he was injured. The physician who attended him and one other witness testified, for appellant, that the deceased told them that he was adjusting the knuckle lock when he was caught. One or two witnesses testified that on the next morning they found, at the place where deceased was injured, a piece of a knuckle lock, or pin, which had been broken, a part of the break appearing old and part new. All the witnesses who testified on the subject stated that it was necessary to remove this broken piece, which could have been done by deceased in two or three minutes, and the remaining part of the pin would have performed the service required of it. Appellant introduced several witnesses who testified that, by custom or some private or unpublished rule of the company, the switch engines had the right of way over all others in the yards at Guthrie, and that it was not the duty of those in charge of it to give any notice or warning of its movements to other crews laboring in the yards; that such crews had to take the necessary steps to protect themselves from injury. Appellee's proof contradicted this. Even admitting

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that such rule or custom existed, it should not be upheld, at least to the extent that it absolves the switch crew from giving notice or warning when about to kick or push cars against standing cars that another crew is preparing to take out. This switch engine passed by these standing cars a few minutes before the injury, and must have seen this engine and crew on track No. 4 preparing to take out these cars. The switch crew all testified that they knew the rules of the company required the brakeman in such case to go between the cars, examine the couplings, and attach the air hose, that this duty could not be done without going between the cars. The custom would be inhuman that would allow a switching crew, without notice or warning, to shove or kick other cars against such standing cars. In the case of Southern Ry. in Kentucky v. Otis' Adm'r, 78 S. W. 480, 25 Ky. Law Rep. 1686, this court said: "There were some dead cars, on what is known as the 'long siding' coupled together, but the air connections had not been made. Conductor Clifford directed Otis to make these connections, and, while Otis was performing this work, those in charge of the Hampton train had uncoupled it, and backed a portion of that train in on this long siding and struck these dead cars, between which Otis was situated, knocked him down, and the wheels passed over his head, killing him instantly. The proof shows that those in charge of the Hampton train did not give any warning signal, either by blowing the whistle or ringing the bell, of the intention of backing the train. The deceased was in a position between the cars where he could not see the train backing. * * * Under the proof in this case, it was negligence on the part of those in charge of the Hampton train to back in on this siding without giv-

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ing any warning thereof by blowing the whistle or ringing the bell." In our opinion the evidence in this case shows gross negligence on the part of those in charge of the switch engine. It shows a reckless disregard on their part for the rights and lives of deceased, and those engaged with him.

The instructions of the court are in the usual form in such cases, and contain no error, at least none prejudicial to the rights of appellant.

Appellant insists that the Kentucky Bank & Trust Company, a corporation, is not authorized by the laws of this State to act as public administrator, in which capacity it brought this action, and contends that, as this fact appears on the face of the petition, this question was properly made and saved by its general demurrer to the petition, and also that, even if it had the right to act as public administrator, it was appointed, according to the exhibit filed with the petition, July 1, 1901, and this action was instituted September 4, 1905, more than four years after the appellee became public administrator, and its term of office had expired long before the action was brought. It appears from the petition, and is not controverted, that appellee was duly organized under the statutes of 1903 of Kentucky. By section 606 of the statutes it is provided that it may be appointed and act as guardian, executor, or administrator; and, by section 611, its capital stock shall be taken and considered as the only security required for the faithful performance of its duties, and no other security shall be required, unless the court or officer in or before whom the bond is executed, or some party in interest, demand it. Under these sections of the statutes, it is clear that it can receive specific appointments as guardian, executor, or administrator, and

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in our opinion there is no reason why it could not be appointed as public administrator. It is true that the statutes (section 3903) say the court shall appoint some discreet, fit person to act as administrator, etc. In Thompson on Corporations, sections 11, 5689, the word "person" is construed as including a corporation, and by section 457 of the Kentucky Statutes of 1903, it is expressly provided that the word "person" may extend and be applied to corporations. Under these authorities, the county court had the right to appoint appellee as public administrator. Appellee in its petition, in addition to setting up its power to act under this appointment as public administrator, made the following allegations: "It says that on February 9, 1905, Wm. H. Herndon died intestate, a resident of Hopkins county, Ky., and on August 30, 1905, it was appointed by said Hopkins county court administrator of his estate, and thereupon qualified as such administrator as required by law, and has acted as such ever since, all of which is shown by the order of said court entered in its Order Book No. 25, p. 8, and a copy of which is filed herewith as part hereof marked 'B.'" Even conceding that appellee's power to act under this appointment as public administrator was not valid, these allegations show a special appointment of it as administrator of this particular estate; but appellant says that the order of appointment does not show that any officer of appellee took the oath required by the statutes. The petition alleged that it qualified as such administrator, and the presumption of law is that the court required it to duly qualify, unless there was something in the order which negatived that fact. We are of opinion that the allegations of the petition show a prima facie right in appellee to prosecute this

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action. Appellant did not controvert in its answer, these allegations, nor allege any fact showing its incapacity to maintain this action. It has contented itself by filing a general demurrer to the petition, which, in our opinion, was not the proper method to reach the question. Section 92, Civ. Code Prac., provides: "A special demurrer is an objection to a pleading which shows, first, that the court has no jurisdiction of the defendant or of the subject of the action; or, second, that the plaintiff has not legal capacity to sue. * * * Either of said grounds of objection, shown to exist by a pleading, is waived, unless distinctly specified by a demurrer thereto, except the objection to the jurisdiction of the court of the subject of the action, which objection is not waived by failing to make it." Appellant, having failed to file this special demurrer, and also having failed to make a plea in its answer showing the incapacity of appellee to maintain this action, waived its right to now present this question. See the case of Warfield v. Gardner's Adm'r, 79 Ky. 583, 3 Ky. Law Rep 423.

Appellant claims that the opinion in the case of L. & N. R. R. Co. v. Brantley's Adm'r, 96 Ky. 297, 16 Ky. Law Rep. 691, 28 S. W. 477, 49 Am. St. Rep. 291, changed this rule. If so it undertook to change a plain provision of the Code, but we do not understand the opinion that way. In that case the petition showed on its face that the deceased was a resident of Indiana when he was killed, and appellee, his administrator, was also a resident of Indiana and appointed as such administrator by a court of Indiana; and in that case the court said that a non-resident appointed as administrator by a foreign state could not maintain an action in this State, unless authorized by statute,

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and no such authority was given by our statute—unlike the case at bar, for in this case appellee was a resident of this State, and the estate of deceased was by express order of the county court referred to it for settlement.

Appellant further contends that the judgment in this case is void for the reason that it was rendered at a special term of the Hopkins circuit court, when a regular term of the court, as fixed by statute, was being held in Caldwell county, Ky.; both counties being in the same judicial district. Appellant's counsel claims that the act to amend section 964 of the Kentucky Statutes of 1903 (chapter 23, p. 249, Acts 1906), authorizing a special term to be held in another county of the judicial district, is unconstitutional and void. We are of the opinion that the amendment is not unconstitutional. Section 131 of the Constitution provides: "There shall be at least three regular terms of circuit court held in each county every year." This section requires the General Assembly to provide for not less than three terms of circuit court a year in any county; but it does not prevent it from providing for more than three terms. This act authorizing a special term in effect provides for another term of the court in the county when it is called, and does not conflict with section 135, which provides: "No court save those provided for in this Constitution shall be established." Section 136 of the Constitution says: "That the General Assembly shall provide by law for holding circuit court whenever for any cause the judge shall fail to attend, or if in attendance can not properly preside." This section is a command to the General Assembly to make provisions for a special judge in the cases named; and does not have the effect to limit the right

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of the General Assembly to provide for special judges in other emergencies. It has the power to enact any law that is not prohibited by the Constitution of the State. It is further claimed that this amendment is violative of section 51 of the Constitution, in that the enacting part provides that section 964 of the statutes shall be amended by adding a specific clause indicated as 964a; that to this amendment there is added an additional subsection 2, which is not embraced either in the title or in the enacting provision. It is conceded by counsel that it does not violate the Constitution to amend a section of the statutes by simply referring to it in the title of the act; but they claim that this subsection is not referred to in the title, and that it makes the law amended void; that the two sections are interdependent, and it cannot be presumed that the legislature would have passed the amendment without clause 2. We are of the opinion that appellant's counsel is mistaken in this. The whole amendment, including the subsection, applies to the same subject, special terms of circuit courts, and special judges when the docket in any court is so congested that the cases cannot be tried at the regular term of the court. But conceding their criticism, with reference to subsection 2, to be correct, and that section to be void for the reasons claimed, the first section of the amendment is not void, and in effect answers the purpose of the amendment. It provides: "In every such case (that is, in case of a congested docket) it shall be lawful for the regular judge of such court, by order entered of record, at a regular term of such court, to call a special term of said court to be held while a court is, or may be, in session in some other county in the district." There are other provisions of the statutes, aside from subsection 2,

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requiring the Governor of the State, upon application, to appoint judges to hold the terms of court. Conceding that the amendment of 1906 is unconstitutional, it does not follow that the judgment in this case is void. This special term was regularly called by the circuit judge. There was no objection made to the assignment for trial of this case at the special term, nor was there any objection or exception to the action of the court in trying the case. As the record appears, appellant must be deemed to have consented to the trial; and the trial was regular in every respect, and the judge who presided must be considered, at least, as a de facto officer, and his acts are binding upon the rights of the public and third persons as if he was the officer regularly elected and qualified for the office and in full possession of it. See the case of Orme v. Commonwealth, 55 S. W. 195, 21 Ky. Law Rep. 1412. In the case of Paducah Land, etc., Co. v. Cochran's Assignees, etc., 37 S. W. 67 18 Ky. Law Rep. 465, it was decided that a special judge of a circuit court could regularly sit and try cases notwithstanding a regular term of the court was being held and presided over by a regular judge. According to this the amendment of 1906 was unnecessary.

For these reasons, the judgment of the lower court is affirmed.

The CHIEF JUSTICE does not concur in so much of this opinion as holds that the Legislature was in its discretion allowed to provide as appointive judiciary in lieu in part of an elective judiciary, except for the express occasions stated in the Constitution.

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CASE 72.—ACTION BY J. E. PENDLETON'S ADMINISTRATOR AGAINST THE LOUISVILLE & NASHVILLE R. R. CO. FOR DAMAGES FOR CAUSING THE DEATH OF PLAINTIFF'S INTESTATE.—October 11.

Louisville & N. R. R. Co. v. Pendleton's Admr.

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Appeal from Todd Circuit Court.

W. P. SANDIDGE, Circuit Judge.

Judgment for plaintiff, defendant appeals.—Reversed.

1. Master and Servant—Nature of Relation.—The relation of master and servant is created by contract, and imposes reciprocal rights, duties, and obligations.
2. Same—Duty to Furnish Safe Appliances and Place for Work. —It is the duty of the master to provide reasonably safe premises and appliances for the servant's use.
3. Negligence—Care Required as to Trespassers.—A trespasser or volunteer, who is injured, cannot recover from the owner of the premises, unless the injury is inflicted after his peril is discovered.
4. Master and Servant—Injuries to Servant—Deviation from Regular Employment.—Where a person employed by a railroad as car inspector voluntarily undertook, without authority, the work of assisting a switching crew, the relation of master and servant was temporarily suspended.
5. Same—Creation of Relation—Implied Contract.—The mere knowledge and implied consent of an agent in charge of railroad yards, who saw an employe of the company leave his regular employment as car inspector and assist a switching crew, did not create by implication of law the relation of master and servant between the employe and the company while he was engaged in that work.

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BENJAMIN D. WARFIELD, Attorney for appellant.

PERKINS & TRIMBLE, of counsel.

POINTS DISCUSSED AND AUTHORITIES RELIED ON.

1. Evidence examined to show that decedent was employed and paid to work in an entirely separate and distinct department of appellant's service from that in which he was injured while doing a reckless, needless, and wholly voluntary thing. He was a trespasser and it is in that light that this case must be viewed. The trial court ruled otherwise, and hence the judgment is erorneous. L. & N. R. Co. v. Gastineau's Adm'r, 83 Ky. 119; Ib. v. Webb, 99 Ky., 332; C., N. O. & T. P. Ry. Co.'s Receiver v. Jackson, by etc., 22 Ky. Law Rep., 630; McDermott, by etc., v. K. C. R. R. Co., 93 Ky., 408; L. & N. R. Co. v. Hocker, 111 Ky., 707; I. C. R. Co. v. Broughton, 25 Ky. Law Rep., 1752; K. C. R. Co. v. McGinty, 9 Ky. Law Rep., 288; Dalton's Adm'r v. L. & N. R. Co., 22 Ky. Law Rep., 97; L. & N. R. Co. v. Thornton, Ib., 778; Monehan v. S. C. & C. St. Ry. Co., 117 Ky., 771.

2. The court erred in admitting incompetent and prejudicial testimony. L. & N. R. Co. v. Malloy's Adm'r, 28 Ky. Law Rep., 113; Ib. v. McClish, 115 Fed., 268, and cases there cited; Lexington Ry. Co. v. Herring, 28 Ky. Law Rep. 794, 96 S. W. 558, and cases there cited.

3. Decedent was a volunteer in the performance of a service unauthorized by his employment, therefore as between appellant and its servants who conducted the switching movements which caused decedent's injury the doctrine of respondeat superior does not apply, and a recovery is barred upon the principle of fellow-servants or that of common employment. Hatfield v. Adams, 29 Ky. Law Rep. 880, 96 S. W. 583.

4. Decedent's contributory negligence should bar a recovery; and the court should peremptorily have instructed the jury to find for appellant. L. & N. Co. v. Mounce's Adm'r, 28 Ky. Law Rep., 933; South Covington, etc., St. Ry. Co. v. Pelzer, 115 Ky., 883-889; L. & N. R. Co. v. Hocker, supra; Favre v. L. & N. R. Co., 91 Ky., 541; P. & M. R. Co. v. Hoehl, 12 Bush, 41-45; Ramsey v. L., C. & St. L. R. Co., 89 Ky., 99-102; I. C. R. Co v. Dick, 91 Ky., 434-441; C., N. O. & T. P. R. Co. v. Finnell's Adm'r, 22 Ky. Law Rep., 86, and L. & N. R. Co. v. Earl's Adm'r, 94 Ky., 368, distinguished.

5. The instructions were erroneous and prejudicial . L. & N. R. Co. v. McCombs, 21 Ky. Law Rep., 1232; Ib. v. Hurt, 116 Ky.,

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on p. 553; Engmann v. Estate of Immel, 59 Wis., 249; Kavanaugh v. Wilson, 70 N. Y., 177-9; Robertson v. Dodge, 28 Ill., 161-3; Evans v. George, 80 Ill., 51-3; Denton v. Carroll, 4 N. Y. App. Div., 532, 40 N. Y. Supp. 19.

PETRIE & STANDARD, attorneys for appellee.

POINTS DISCUSSED AND AUTHORITIES RELIED ON.

1. The evidence in this case shows the decedent, Pendleton, from the summer or early fall of 1904, until the time of his death, in February, 1905, was engaged in assisting the switching crew in the yards at Guthrie, Ky., under the direction and supervision of H. C. Anderson, foreman of the switching crew, and with the knowledge of J. L. Cash, general agent of the company at Guthrie, and that he engaged in this work to such an extent that he could not be distinguished, by reason of work performed, from any other member of the crew.

2. Decedent, at the time of his death, was not guilty of contributory negligence, but appellant was guilty of inexcusable negligence, which resulted in the death of decedent. Louisville & Nashville R. R. Co. v. Earl's Adm'r, 15 Ky. Law Rep., 186.

3. In this case it was a question for the jury to decide whether decedent at the time he was killed was acting outside the scope of his employment, or whether he was, at the time, engaged in switching cars for the railroad company, with the consent and approval of the agents of the company in control of said work of switching and in control of the men engaged therein. Labatt on Master and Servant, vol. 2, p. 1867; I. C. R. R. Co. v. Timmons, 30 Ky. Law Rep (not yet reported in Ky. Law Rep.); Rummell v. Dilworth, Porter & Co., Am. St. Rep., vol. 17, 827; Delleman v. Saalfeldt, 67 Am. St. Rep., 214.

4. The railroad company having accepted the service of decedent as switchman, he should be regarded as an employee while working in this capacity and not as a volunteer. Am. & Eng. Encyc. Law, vol. 14, pp. 751 and 876; Labatt on Master and Servant, vol. 2, pp. 1863, 1864, 1867, 1868; Collins v. C., N. O. & T. P. R. R. Co., 13 Ky. Law Rep.,670 ; Cumberland Tel. & Tel. Co. v. Adams, 28 Ky. Law Rep., 1265; Rummell v. Dilworth, Porter & Co., 17 Am. St. Rep., 827; Witkowski v. Geo. W. Carter Sons Co., 70 N. Y. Supp., 32; Mullens v. N. W. Mill Co., 55 N. W., 1115; East Line & R. River R. R. Co. v. Scott, 5 S. W. R., 501; Johnson v. Ashland Water Co., 5 Am. St. Rep., 243; Consolidated Coal Co. v. Bruce, 150 Ill., 454; Dellemand v. Saalfeldt, 67 Am. St. Rep., 214; Fitzhenry v. Lamson, 45 N. Y. Supp., 875.

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5. Evidence as to previous work done by decedent as switchman was proper and competent. Labatt on Master and Servant, vol. 2, 1868; Collins v. N. O. T. P. R. R. Co., 13 Ky. Law Rep. 670.

6. J. L. Cash and H. C. Anderson were, at the time of the injury and prior thereto, agents of the railroad company at Guthrie, Ky., the former being general agent at said point with complete control over the switching operations, and the latter being foreman of the switching crew, and each had both express and implied authority to accept the services of deceased with the switching crew. N. N. & M. B. Co. v. Carroll, 17 Ky. Law Rep., 374; L. & N. R. R. Co. v. Willis, 6 Ky. Law Rep., 784.

Reply brief by SELDEN Y. TRIMBLE, for appellant.

POINTS AND AUTHORITIES.

1. Incompetent evidence. L. & N. R. R. Co. v. Webb, 99 Ky., 332; Jackson's Adm'r v. L. & N. R. R. Co., 28 Ky. Law Rep., 311; L. & N. R. R. Co. v. Fox, 11 Bush, 505; 21 Encyc. of Law (new), p. 513; Labatt on Master and Servant, p. 2280.

2. An express contract necessarily excludes the idea of an implied contract. 15 Encyc. of Law (new), p. 1078; Walker v. Brown, 81 Am. Dec., p. 287; Fonda v. Smith, 5 Ky. Law Rep., 853; Pringle v. Samuels, 1 Bibb., 172; Coffman v. Allin and wife, Litt. select Cases, 200.

3. Appellee's decedent was a trespasser, a volunteer—at best a mere licensee; appellant owed him no duty except the exercise of ordinary care to avoid injurying him after its discovery of his peril. The court should have given a peremptory instruction at the close of plaintiff's evidence, and certainly at the close of all the evidence. 20 Encyc. of Law (new), p. 154; Labatt on Master and Servant, vol. 2, section 629; K. C. R. R. Co. v. Gastineau's Adm'r, 83 Ky., 119; K. C. Ry. Co. v. McGinty, 9 Ky. Law Rep., 288; McDermott, etc., v. K. C. Ry. Co., 93 Ky., 408; L. & N. R. R. Co. v. Webb, 99 Ky., 332; C., N. O. & T. P. R. R. Co. v. Jackson, 22 Ky. Law Rep., 630; L. & N. R. R. Co. v. Thornton, 22 Ky. Law Rep., 778; L. & N. R. R. Co. v. Hocker, 111 Ky., 707; Cook v. L. & N. R. R. Co., 24 Ky. LawRep., 1967; I. C. R. R. Co. v. Broughton, 25 Ky. Law Rep., 1752; Shadoan's Adm'r v. C., N. O. & T. P. R. R. Co., 26 Ky. Law Rep., 828; Hatfield v. Adams, 29 Ky. Law Rep., 880.

4. Appellant is not liable for the negligence of decedent's fellow servant.

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OPINION OF THE COURT BY JUDGE CARROLL.—Reversing.

J. E. Pendleton, while engaged in assisting a switching crew, was killed by being crushed between two cars. In this action his administrator recovered $5,000 for the destruction of his life. A reversal is asked for several alleged errors committed by the trial court.

To understand fully the questions involved, it will be necessary to relate with some particularity the facts exhibited by the record. Pendleton, who was about 22 years of age, was first employed in November, 1904, by appellant as a yard clerk in its yards at Guthrie, Ky. He remained in this branch of the service until January, 1905, when he was transferred to the car inspector and repair department, and worked there until his death on February 6, 1905. His duties as yard clerk and in connection with the inspector and repair department did not require him to do anything with reference to the switching or shifting of cars in the yard, or to assist in any way the switching crew; and it is conceded that he was never employed as a member of the switch crew. Previous to his engagement by appellant, and during the time he acted as yard clerk and worked in the inspector and repair department, he was endeavoring to fit himself for the position of brakeman, and had quite a desire to get this place. Frequently, while acting as yard clerk and inspector, he assisted the switching crew in their work, throwing switches, giving signals to the engineer, riding the cars—in fact, doing everything that the regular switching crew did. There is evidence that he did this with the knowledge

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and at least implied consent of the person in charge of the yard and in charge of the switching crew. On behalf of appellant the evidence upon this question is in effect that, although its agent in charge knew Pendleton often assisted the switching crew in the performance of the duties before mentioned, he had frequently requested him not to do so, calling his attention to the dangerous nature of the employment. The foreman under whom he worked as assistant inspector and car repairer testified that his duties in this department required his attention from 7 o'clock in the morning until 6 in the afternoon, although it often happened that for a short time during these hours there was no work necessary to be done in that department. Pendleton was killed at 5 o'clock in the afternoon, and immediately before this was engaged in his duties as car inspector with Anderson, his foreman. Anderson testifies that, when Pendleton left at 5 o'clock to assist the switching crew, he needed his services, and so informed him, but, notwithstanding this, he went to where the switching crew was at work, doubtless expecting to return to Anderson in a short while. Several days before February 6th a car loaded with coal had been placed on a coal track, adjacent to a coal yard, to be unloaded, and after being unloaded it was permitted to stand for about four days on the coal yard track, so close to the passing track used for switching purposes that a person riding on the ladder on the side of a car on the passing track would be struck by the car on the coal track, although there was room for the cars to pass. On the evening Pendleton was killed the switching crew was engaged in putting ten cars on the passing track. To do this the cars were run by the coal track on which the empty coal car was standing. The switch crew

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consisted of an engineer, fireman, conductor or foreman, and two switchmen. These composed the full crew. Five of the cars were first put on the passing track; Pendleton being with the crew. These five cars were left on the passing track by the engine, and it went back to get the other five. After connecting with the last-named five cars, Pendleton threw the switch to permit the engine to take the cars on the track where the first five had been placed; and after throwing the switch, which was close by and in plain view of the car standing on the coal track, he jumped on one of the cars being pushed by the engine, putting his feet in the stirrup on the bottom of the side of the car, and holding onto the ladder attached to the side of the car, placed there for the purpose of enabling employes to get from the ground to the top of the car. While thus riding on the side of the car he was struck and almost instantly killed by coming in contact with the empty coal car standing on the coal track as the car on which he was riding passed it. When Pendleton jumped on the car, as it was passing the switch he had opened, it was running about eight miles an hour. It does not appear that the engineer or any of the switch crew knew that he was going to get on the car; but the engineer saw him a moment after he had climbed on the side of it, and, knowing the proximity of the empty car to the passing track and the perilous position that Pendleton was placed in, applied his emergency brake and did everything possible to stop; but he was unable to stop the cars until after Pendleton had been struck. We may remark in passing that no blame is attached to the engineer or any of the switch crew. The negligence complained of is in permitting this empty car to remain standing for several days so close to the

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passing track as to endanger the life of a person who might be riding on the side of a car running on the passing track. There being evidence to show that it was usual and customary for the switch crew to ride in the manner in which Pendleton was riding, the contention of appellee is that Pendleton, considering all of the facts and circumstances proven in the case, is entitled to be treated as if he were a member of the switch crew.

The real issue in the case, and the one to which counsel have especially addressed themselves, may be thus stated: For appellee it is said that as Pendleton, with the knowledge and implied consent and approval of the person in charge of the yard, was permitted to frequently perform the duties of a switchman, such as throwing switches, giving signals, and riding cars, the company owed to him the same duty that it did to a regular member of the switching crew. The company's argument, supported by the testimony introduced by it, is that Pendleton was employed in a different department of its service; that he had no duties to perform in connection with the switching crew; that although he was at times, with the knowledge and apparent consent of the person in charge of the yard, permitted to assist in the performance of these duties, he did so without his approval and in opposition to his direct commands; and hence he is to be treated as a trespasser or volunteer, and the company cannot be held responsible for his death. It is further urged that his duties as car inspector and repairer demanded his attention and service from 7 a. m. to 6 p. m., and that during these hours he should have remained at the place where the performance of his duties required him to be. It may safely be said, and for the purpose of this

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case we will assume, that the evidence establishes that Pendleton did, with the knowledge and at least implied consent of appellant's agent in charge of the yard, although not by his request or direction, often assist in switching cars and perform all the other duties incident to the work of a switchman, and that when killed he was so engaged; that in throwing the switch, immediately before he jumped on the car that carried him to his death, the agent in charge of the yard was not present, nor was the foreman of the switching crew; nor did either of them have any knowledge that he was going to throw the switch or ride the car. And in considering the case we will treat it as if the agent of appellant in charge of the yard had the right to employ switchmen and to control their movements; in fact, that he was, in respect to everything done by employes of the company in and about the yard, the respresentative of the company, conpetent to charge it with his acts. We will also assume that if the relation of master and servant existed between the company and Pendleton—in other words, if he is to be deemed a brakeman—it was guilty of such negligence in permitting the car on the coal track to remain so dangerously near the passing track as to render it liable in damages for his death. So that the issue narrows down to the proposition, squarely put: Did the relation of master and servant exist between Pendleton and appellant at the time of his death, or was he then a mere trespasser or volunteer? Upon the correct determination of this question depends the result of this case, and we will endeavor to solve it by applying the law as we understand it to the facts as herein stated.

The relation of master and servant is created by contract, either express or implied. It imposes recip-

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rocal rights, duties, and obligations. As a part of the duties growing out of this contractual relation the law imposes on the master the obligation of providing reasonably safe premises and reasonably safe appliances for the use of the servant; and if delinquent in these respects, and the servant is injured thereby, the master may be compelled to respond in damages for his breach of duty. This relation cannot be created by one of the parties. The assent of both, either express or implied, is necessary. A person cannot impose on another the responsible obligation resting upon a master without the participation of such other person. The law, in the absence of some contractual arrangement or agreement, express or implied, will not create the relation of master and servant. The trespasser or the volunteer who is injured in or about the performance of labor that he undertakes, cannot look to the owner of the premises to compensate him for the injury or damage, unless it is inflicted after his peril is discovered. And when a person employed to perform certain services goes entirely without the line of his duty and assumes the performance of other labors for his master, without his direction or authority, he occupies no better position than if the relation of master and servant did not exist in respect to any employment between them, as, when the master engages a servant to perform specified service, he is only responsible to him for some breach of duty committed within the scope or limits of the employment for which the servant has been engaged. Thus, in Thompson on the Law of Negligence, section 4677, it is said: "An employe, who undertakes without the order or request of his employer, or the representative of the employer, or contrary to his orders, or in compliance with the

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orders or request of another employe who has no authority from the employer to give such orders or to make such request, to perform work outside the scope of his employment or upon dangerous premises, where the terms of his employment do not require him to do or be, * * * is deemed to assume the risk attendant upon his voluntary undertaking, and cannot recover for injuries occasioned by any defect in the premises, machinery, or tools to which he thus voluntarily exposes himself. The reason of the rule is obvious. The master undertakes to exercise reasonable care to the end of keeping his premises, his machinery, his tools, and his appliances in a reasonable condition of safety for the protection of the servant employed in a stated service, and so long as he continues in that service. But, when he places himself outside the line of his duty, the relation of master and servant is deemed to be temporarily suspended. His position is then in all things that of a trespasser or bare licensee. The master owes him no duty to anticipate his deviation from his duty and the possible danger which may arise to him therefrom, and to provide against it. He takes things as he finds them, and suffers all consequences of his own error, and cannot make his master liable therefor. The law will not, on obvious grounds of justice, compel the master to pay damages which the servant has brought on himself by undertaking to do something which the master did not employ him to do, but will ascribe his calamity to his own unnecessary and gratuitous act." The same doctrine is announced in Labatt on Master and Servant, section 633, and approved in Louisville & Nashville R. R. Co. v. Hocker, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119, 23 Ky. Law Rep. 982, 1274. Therefore, although Pen-

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dleton at the time of his death was engaged by appellant as car inspector and repairer, and in this employment the relation of master and servant existed between them, with all its attending duties and obligations, yet it did not continue when without authority or direction he voluntarily undertook the performance of other duties entirely disconnected with those for which he was engaged. In performing these new duties, he occupied towards his employer or master the same relation as if he were an entire stranger. His attitude in assisting the switching crew was the same as if he had quit his work as clerk in a store or as laborer on a farm to undertake them.

The remaining question to be considered is: Did the fact that he assisted the switching crew, with the knowledge and implied consent of the agent in charge of the yard, have the effect of establishing for the time being the relation of master and servant between him and the person for whom he voluntarily assumed to work? In assisting the switching crew, he did not take the place of any member of that crew. His services were not needed. In helping them he was acting with a view to his own advancement, and endeavoring to become proficient as a brakeman and switchman; and in our opinion the relation of master and servant between Pendleton and appellant could not in this manner and under the facts of this case be created. Certain it is that he had never been employed as a member of the switching crew, nor had he ever been requested or directed by any person in authority to perform any of the duties in connection with it. The foreman of the crew had no authority to bind the company by his consent to or approval of Pendleton's service. He was under the control of the agent; indeed, strictly speaking, the right of employ-

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ment was in the train dispatcher, under the rules of the company. He had his full complement of men. No emergency existed that made it necessary to obtain other assistance. Thompson on Negligence, sections 4982-4990. The mere knowledge, and we may assume implied consent and approval, of the agent in charge of the business, who looked on and saw decedent quite frequently assist the switching crew, did not have the effect of creating by implication of law the relation of master and servant, or convert him from a volunteer into a servant. We do not mean to say that this relation may not be created by an implied contract, as if a person authorized to employ labor should request or accept the needed service of a person who volunteered to perform it. But it would be announcing an unreasonable rule to declare that any person, who might choose, for his own instruction, entertainment, or benefit, to assist persons engaged in an occupation, might thus become in the eye of the law a servant entitled to demand and receive the protection accorded to persons that occupied that relation by virtue of rights growing out of contract. It is true that, if Pendleton's services were not needed or desirable, he could have been peremptorily ordered to absent himself from the yards, or, if necessary, could have been discharged from the employment of the company, or, indeed, in an extremity, might have been arrested for trespassing. But persons in the conduct of their business are not required to resort to these extreme measures to prevent men of intelligence and common understanding from volunteering in affairs about which they are not employed; nor is it necessary that they should do so to prevent a volunteer, trespasser, or intruder from creating the legal relation of master and servant. Intruders, tres-

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passers, and volunteers assume the risk incident to the unauthorized acts they perform; and, in dealing with them in cases of injury, the law will not enforce or apply the rules governing the relation of master and servant, but only hold the persons accountable for the injury to the duty of avoiding it, if they could have done so by the exercise of ordinary care after the peril was actually discovered. When Pendleton left his employment as car inspector, and went to assist the switching crew, he must be held to have accepted conditions in the switching yards exactly as he found them. As to him, the railroad company was under no obligation to move the car causing his death; nor can it be held liable for its negligence in permitting it to remain there. It owed him no duty, except to avoid injury after his peril was actually discovered.

It would be difficult, and we will not attempt, to lay down any fixed rule, or one of general application, in the settlement of the intricate question as to when persons not employed are to be treated as volunteers or as servants. The conditions and circumstances under which volunteers perform services are so varying that often, although beginning as volunteers, they may become for the time being servants, entitled to protection the same as if regularly employed in the first instance. The books are full of distinctions and differences, growing out of the facts of each case as they are presented to the court. We may, however, with no sense of uncertainty, say that something more than mere knowledge of, and implied consent to, occasional acts of service, in employments like the one under consideration, will be required to create the important relation of master and servant. If the relation could be thus established, employers,

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especially those engaged in large business interests, with widely separated agencies, operating under systems carefully planned and constructed to insure discipline, efficiency, and safety, and where each employe is selected with some reference to his fitness and qualifications for the service he is engaged to perform, would often find their business disarranged, their discipline interferred with, and their employes hindered and disturbed. Aside from this, they would be subjected to liabilities they had not contracted for, and could not well anticipate or guard against. In Labatt on Master and Servant, vol. 2, section 630, it is said: "A person cannot be subjected without his own consent or that of his agent, to the obligations which the law attaches to the contract of hiring." It must also be conceded that there is a wide difference between requesting or directing a person to work even for an hour or a few minutes, and merely permitting him to render desultory service that is not needed, although it may be accepted, and thus impliedly, at least, consented to. In the one instance the master has been consulted. He has exercised authority and discretion. In short, he had entered into a contract. In the other, he has merely submitted to interference by a volunteer upon his premises and permitted him to do things that were not helpful or necessary. And this distinction will be found running all through the cases on this subject. A formal or express agreement is not required, nor is it essential that compensation should be paid or expected from the one sought to be charged. Also, the relation may be implied from facts and circumstances surrounding the employment; but we will not, in the course of this opinion, undertake to say what facts might raise an implied contract, as it is not necessary to the decision

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of this case that we should do so. Sufficient for the questions before us is the statement that here the facts do not warrant the conclusion that there was an implied contract.

In Kentucky Central R. Co. v. Gastineau's Adm'r, 83 Ky. 119, 7 Ky. Law Rep. 17, Gastineau, a boy between fourteen and fifteen years of age, was run over and killed by a car of the railroad company which he was endeavoring to uncouple from a train while switching in the company's yard. In a special verdict the jury found that the deceased, when killed, was voluntarily assisting the employes of the road, with their knowledge and consent, in switching cars; that they discovered his peril too late to prevent his death; and that he contributed to it by his presence and offering to uncouple the car. In the course of the opinion the court said: "The deceased could not be regarded as a servant or employe of the company at the time of his death. He did not in a legal sense occupy that relation. and was to it a stranger; and in this light the rights of the parties must be viewed. A railroad company has a right to the exclusive use and occupation of its yard and track, except at crossings or such places as the public are by law authorized to use. Otherwise, it could not properly perform its duties to the public. It is not required to anticipate the intrusion of others, and one who enters upon them wthout right does so at his peril, and in case of injury cannot recover, unless it was wantonly inflicted after the danger was discovered. * * * Without having in view for the present the age of the deceased, we remark that the fact that a mere employe knows of the presence of an intermeddler does not legalize it, and so place him as to the company in its protection that it is bound to

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anticipate and ascertain if he has placed himself in danger, instead of being merely bound to use reasonable care to avert it after its discovery. It has been held that even a request of one, being an employe of the company, to do some act connected with the management of a train, does not impose such a duty upon it or render the person less an intermeddler as to the company." This opinion was followed and approved in Monehan v. Covington St. Ry. Co., 117 Ky. 771, 25 Ky. Law Rep. 1920, 78 S. W. 1106; Illinois Central R. Co. v. Broughton, 78 S. W. 876, 25 Ky. Law Rep. 1752; L. & N. R. Co. v. Hocker, 111 Ky. 707, 23 Ky. Law Rep. 982, 1274, 64 S. W. 638, 65 S. W. 119; Hatfield v. Adams, 96 S. W. 583, 29 Ky. Law Rep. 880, 123 Ky. 428.

We have examined with care the authorities cited by appellee, but in none of them do we find anything in conflict with the principles heretofore announced. In Illinois Central R. Co. v. Timmons the principal question in the case was whether or not the person who employed Timmons had authority to do so; and this was the point in issue. In Collins v. C., N. O. & T. P. Ry. Co., 18 S. W. 11, 13 Ky. Law Rep. 670, Collins was injured by the explosion of a gas tank. One of the issues in the case was whether or not at the time he received the injury he was engaged in the business of the company. After stating the facts, the court said: "These facts plainly show that in the case of a fire upon appellee's premises it was the duty of deceased to aid in extinguishing it, and that in doing so he was acting as its employe." In Cumberland Telephone & Telegraph Co. v. Adams, 91 S. W. 739, 28 Ky. Law Rep. 1265, Adams was in the employment of the company as a groundman. On the evening he was hurt he was sent by the foreman with

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his brother, Ed Adams, who was a lineman, to adjust some trouble which had occurred to the company's wires. When they arrived at the place, his brother ordered him to climb the pole and remedy the trouble. He did as directed, and in the performance of the duty was injured. The point was made that at the time he received the injury he was acting as a lineman, that being a different grade of employment from groundman, and hence he ought not to recover, as he was engaged in a service outside the line of his employment. The court said: "Now it is clear that whether appellee is called a lineman or groundman does not alter his right to recover in this action, if he was on the pole at the time of his injury in the performance of any duty he owed to appellant. If it be true, as he says, that Lee sent him to assist his brother, who, being a lineman, was his superior, and his brother told him to climb the pole, then he was in the performance of a duty owing to his employer. Of course, if he was a mere volunteer, who went up the pole without right or authority, then the company owed him no duty at all. We think it entirely immaterial whether appellee was technically a lineman or groundman. If he was a groundman, beginning to perform the duties of a lineman, and was in truth sent up the pole by his superior, then he was entitled certainly to no less protection, because of his want of experience, than if he had been a lineman, so experienced as to know better how to take care of himself. The whole question turns, not upon whether appellant was a lineman or groundman, but whether at the time he climbed the pole he was in the performance of a duty he owed to appellant company." In Johnson v. Ashland Water Company, 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243, it is stated in the opinion that

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"the plaintiff was engaged in the defendant's work at the request of a man in charge of the work, and although it may be said that his employment was for a mere temporary purpose, and that the plaintiff was not expecting any pay for the work done, and in that sense the work was volunteered, still, being in the defendant's employment and at the request of its servant or foreman, he was not a trespasser, and he was for the time being the servant of the defendant, and entitled to the same protection as any other servant of the defendant." In Dallemand v. Saalfeldt, 175 Ill. 310, 51 N. E. 645, 48 L. R. A. 753, 67 Am. St. Rep. 214, the servant was performing duties outside the scope of his employment, but by direction of a foreman. In Huntzicker v. Illinois Central R. Co., 129 Fed. 548, 64 C. C. A. 78, the injured person was learning the duties of brakeman by the written direction of the trainmaster. In Ringu v. Oregon Coal Co., 44 Or. 407, 75 Pac. 703, young Ringu, who was injured, was assisting his father in working in a mine. It was the custom, authorized by the company, to permit fathers to employ their sons, and for some time before the accident Ringu had been so working with the knowledge and consent of the company, and the company had furnished extra cars for his use and paid the father for his services. It will thus be seen that all of these cases are easily distinguishable from the one before us. Running through all of them will be found the proposition that the employment was by request, express or implied, and upon this assumption recovery was allowed. We have been unable to find any authority to support the position, taken by appellee, that the mere fact that Pendleton, with the knowledge and consent of appellant, rendered service to the

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switching crew, had the effect of creating the relation of master and servant.

Our conclusion is that upon the facts presented by this record appellee was not entitled to recover. He was a mere volunteer, who placed himself in a position of danger. The railroad company owed him no duty, except to exercise ordinary care to avoid injury to him after his position of peril was discovered; and, as we have seen, there is no claim of negligence in this respect.

Wherefore the judgment is reversed, with directions for a new trial consistent with this opinion.

CASE 73.—INDICTMENT AGAINST MOSES KAUFMAN FOR VIOLATING THE ELECTION LAWS, AS CLERK OF A PRIMARY ELECTION.—October 10.

Commonwealth v. Kaufman

Appeal from Fayette Circuit Court.

WATTS PARKER, Circuit Judge.

From a judgment sustaining a demurrer to the indictment the Commonwealth appeals—Reversed.

1. Elections—Primary Elections—Officers—Offenses—Indictment. Under Cr. Code Prac., section 122, subsection 2, providing that an indictment containing a statement of the act constituting the offense in ordinary and concise language shall be sufficient, an indictment alleging that accused, as judge of election at a primary election, performed his duties in such a way as to hinder the objects of the election by marking the ballots of electors, though none of them were blind nor physically disabled, states an offense denounced by Ky. Stats., 1903, sec. 1577, punishing any officer who shall perform his duty in such

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a way as to hinder the objects of the law, since section 1475 only authorizes an election officer to mark the ballot of an elector who is illiterate or blind or physically disabled.

2. Same—Statutes—Construction.—Ky. Stats., section 1552, providing that an act denounced an offense by the law concerning elections shall be an offense in primary elections, and section 1563, declaring that the officers of primary elections shall be subject to the same limitations as officers of regular elections, and any act denounced by the general laws as an offense in case of officers of regular elections shall be an offense in case of officers of primary elections, extend section 1577, punishing election officers who shall perform their duty in such a way as to hinder the objects of the law, to officers of primary elections.

3. Same.—A primary election officer, who, in such a way as to hinder the object of the law, marked the ballots of electors who were not blind nor physically disabled, violated Ky. Stats. 1903, section 1577, punishing election officers who shall perform their duties in such a way as to hinder the objects of the law.

4. Same—Offenses—Proof.—To convict an election officer of a violation of Ky. Stats. 1903, section 1577, punishing an election officer who shall willfully perform his duty in such a way as to hinder the objects of the law, it must appear not only that he willfully committed the acts charged, but that they were committed with the intent to hinder the objects of the election law, and that they did so hinder, or were reasonably calculated so to do.

5. Same—Marking Ballots—Statutes.—The duty of marking the ballots of illiterate, blind, and physically disabled electors must, under the express provisions of Ky. Stats. 1903, section 1475, be performed by the clerk of the election, though an accidental performance of such duty by a judge or sheriff of election does not amount to a violation of section 1577, punishing election officers who shall perform their duties in such a way as to hinder the objects of the election laws.

6. Same—Indictment—Sufficiency.—An indictment charging a primary election officer with performing his duties in such a way as to hinder the objects of the election law, in violation of Ky. Stats. 1903, section 1577, which alleges that on a designated date the regularly constituted governing authority of a political party of the state held a primary election in the state; that for at least 40 days prior to such election the committee gave public notice thereof, etc.; that on such day

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accused was acting as a judge of election in an election precinct, etc.—sufficiently alleges the holding of a primary election as authorized by law.

N. B. HAYS, Attorney General, and C. H. Morris, attorneys for appellant.

By section 1475 of Kentucky Statutes, it is provided how illiterate, blind and disabled persons may have their ballots marked by the clerk of the election; but in each instance, each party is required under the law to declare on oath before the clerk of the election that he is illiterate, blind or unable to mark his ballot. This duty, under the law, is imposed on the clerk and not on the judge, and for the judge or the clerk to mark this ballot without the elector first declaring on oath as required under the statute, is willfully discharging the duties of an election officer in such a way or manner as to defeat the purpose and intention of the law. This provision of the statute is intended to prevent corrupt election officers or others desiring to defeat the will of the voter by bribery, intimidation or coercion. It opens a flood gate to all the evils and frauds from which the secret ballot system was intended to protect the voter and public. It is the source of fraud and corruption by which it seeks to overthrow the will of the people by bribery, fraud and coercion; and if election corruptionists are permitted to mark the ballots of the floaters and the weak and debauched, without such elector declaring on oath that he is under disability mentioned in the law, then the secret ballot system has no longer a place on the statute book.

MORTON, WEBB & WILSON for appellee.

PROPOSITIONS AND LIST OF AUTHORITIES.

1. This indictment is under section 1577, and there is no offense committed under this section unless it is a violation of a duty imposed upon an officer, and not upon an individual. Ky. Stats., section 1577.

2. An indictment must allege the specific duty which was imposed upon an officer, or else it is defective. U. S. v. Kelsey, 42 Fed, Rep., p. 884; U. S. v. Cook, 17 Wallace, 174; U. S. v. Cook, 92 U. S., 558.

3. An allegation that an election was held "by the regular organized and constituted committee and governing authority of the Democratic party," is a conclusion of law, and not a state-

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ment of fact, as required in an indictment. Commonwealth v. Maddock, 17 Ky. Law Rep., 558.

4. Requisites of notice for primary election. Ky. Stats., section 1553.

5. The exception that the voters were not unable to mark their ballots by reason of inability to read the English language, must be negatived. Ky. Stats., section 1475.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

On February 5, 1907, the appellee, Moses Kaufman, was indicted in the Fayette circuit court for unlawfully and wilfully performing the duties of an election officer at the Democratic state primary election held on the 6th day of November, 1906, in such way as to hinder the objects thereof. The indictment is as follows: "The grand jury of Fayette county, in the name and by the authority of the Commonwealth of Kentucky, accuse Moses Kaufman of the offense of unlawfully and wilfully performing the duties of an election officer in such a way as to hinder the objects of the election law as follows, to-wit: That on the 6th day of November, 1906, the regularly organized and constituted committee and governing authority of the Democratic party of the State of Kentucky held a primary election, in the State of Kentucky, county of Fayette, and city of Lexington, at which election candidates for United States Senator from Kentucky, and for all the State offices of the State of Kentucky, were voted for; that for at least forty days prior to such primary election the committee and governing authority of said party did give public notice of said election by posting such notice on the courthouse door in the city of Lexington, county of Fayette, and in at least twenty other public places in the said county; that on said day that said Moses Kaufman

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was then and there acting as a judge of election in the Merino Street precinct in said city of Lexington and county of Fayette, which was a regular election precinct in said city of Lexington and county of Fayette; that said Kaufman had prior to the said election, been regularly and duly appointed as an officer of said election and judge of said election at said precinct by the regularly organized and constituted committee and governing authority of the Democratic party of Kentucky, and the said Moses Kaufman did then and there unlawfully and wilfully perform his duty as judge of election in such a way as to hinder the objects of the election law, by marking and stamping the ballots of divers electors at said election in said precinct, whose names are unknown to the grand jury, in the presence of the voters and of the other election officers at said precinct; and none of the said electors was then and there blind, and did not so declare on oath, and none of said electors was so physically disabled as to be unable to mark his ballot, and did not so declare on oath—against the peace and dignity of the Commonwealth of Kentucky." Appellee filed a demurrer to the indictment, which was sustained in the court below. This appeal, prosecuted by the Commonwealth, presents for our decision the sole question whether or not the indictment sufficiently charges a public offense.

It appears from the language of the indictment that the acts of appellee, constituting the offense charged, are alleged to have been committed by him while acting by legal appointment as judge of election in the Merino Street precinct of the city of Lexington, at a State primary election legally called by the governing committee of the Democratic party and held November 6, 1906, throughout the State of Kentucky, in-

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cluding Fayette county, for the purpose of nominating a Democratic candidate for United States Senator and for each of the several State offices, and that he (appellee) "did then and there unlawfully and wilfully perform his duty as judge of election in such a way as to hinder the objects of the election law by marking and stamping the ballots of divers electors applying to vote at said election in said precinct, whose names are unknown to the grand jury, in the presence of the voters and the other election officers at said precinct; and none of the said electors was then and there blind and did not so declare on oath, and none of said electors was so physically disabled as to be unable to mark his ballot and did not so declare on oath. * * *" The offense laid at appellee's door is one denounced by the election law and defined by section 1577, Ky. St. 1903, as follows: "Any public officer upon whom a duty is imposed under this chapter, and no penalty provided for the violation thereof, who shall wilfully neglect to perform such duty, or who shall wilfully perform it in such a way as to hinder the objects of this law, shall be punished by a fine of fifty dollars and imprisonment in the county jail for two months." Section 1475, Ky. St. 1903, provides: "Any elector who declares on oath, that, by reason of inability to read the English language, he is unable to mark his ballot, may declare his choice of candidates or party ticket to the clerk, who, in the presence of the judges, sheriff and challengers and the elector, shall, with his pencil, mark a dot in the appropriate place for the cross mark, to indicate the choice of the elector. The clerk shall then fold and deliver the ballot to the elector, and instruct him to retire to the booth and there mark his ballot by marking a cross mark either in the squares showing dots or any other squares he

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may desire. In all other respects he shall vote as is required of other electors. In case any person applying to vote is blind, and shall so declare on oath, the clerk shall be allowed to mark his ballot for him in the presence of the other officers of election, and the challengers allowed by law; or in case any person shall be so physically disabled as to be unable to mark his ballot, and shall so declare on oath, the clerk shall have the right to mark his ballot as in the case of a blind person applying to vote. Any one making a false declaration under this provision of this section, shall, upon conviction, be fined in any sum not exceeding fifty dollars, and be disfranchised for a period of two years; and any clerk who shall wilfully deceive any elector in marking any ballot, or wilfully mark the same in any other way than as requested by said elector, shall be guilty of felony, and, upon conviction, shall be imprisoned in the penitentiary for not less than two nor more than five years."

Three classes of electors, which the secret ballot system would otherwise exclude from voting, are protected in the right of suffrage by this section, viz., the illiterate, the blind, and those so physically disabled as to be prevented thereby from marking their ballots. For these the clerk may act under certain conditions; that is, he may, in the presence of the judges, sheriff, challengers, and the illiterate elector himself, indicate to the latter with a pencil dot where to mark his ballot so as to express his declared choice of candidates, provided that the elector first makes oath that by reason of his inability to read the English language he is unable to mark his ballot without the clerk's assistance. But, after being thus instructed by the clerk, he must, upon receiving from that officer the ballot properly folded, retire within

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the booth and mark it himself. If the elector be blind, or so physically incapacitated as to be unable to mark his ballot, the clerk, in the presence of the other officers of election named, challengers, and the elector, shall actually mark the ballot for the elector so as to express his avowed choice, after the latter shall have first declared upon oath his blindness or physical disability incapacitating him from marking his ballot. In setting forth the offense the indictment substantially follows the language of the statute, and the particular acts constituting the offense are alleged in such terms as bring the case within the provision of the statute. Powers v. Com., 90 Ky. 167, 11 Ky. Law Rep. 964, 13 S. W. 450; Higgins v. Com., 94 Ky. 54, 14 Ky. Law Rep. 729, 21 S. W. 231.

The indictment is sufficient, as it contains "A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case." Cr. Code Prac. section 122, subsection, 2. Elections are under the control of the officers appointed to hold them, and this is especially true of the judges of election, who not only pass upon the qualifications of the electors, but are, in addition, with the other officers of the election, required to see that they vote in the prescribed manner, and that their ballots are deposited, counted, and the result certified and returned in conformity to law. Section 1552, Ky. St. 1903, provides: "Any act denounced an offense by the general laws of the State concerning elections, shall also be an offense in all primary elections and punished in the same form and manner as is provided for the punishment of

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similar offenses by the general laws; and all the penalties and provisions of the general law shall apply in such cases with equal force and shall be as effective as though fully set out in this article." Again, as if to leave no doubt of the intention of the legislature to extend the provisions of the section, supra, to include officers of a primary election, these further provisions were inserted in section 1563 of the same statute, viz.: "The officers of all primary elections, held under the provisions hereof, shall have the same powers and privileges as officers of regular elections, and shall be subject to the same restrictions, limitations, and conditions. Any act or deed denounced by general laws as an offense in the case of officers of regular State elections is hereby declared to be an offense in the case of officers of such primary elections, and shall be punished in the same form and manner as is prescribed by general law." If, in the exercise of his powers as an election officer, appellee, unlawfully, wilfully, and in such way as to hinder the objects of the election law, marked or stamped the ballots of "divers electors," who were not blind, and had not so declared on oath, or were not so physically disabled as to be unable to mark their own ballots, and had not declared such disability on oath, his acts amounted to a violation of the election law as charged in the indictment.

But while, as already indicated, we think the indictment good, we are further of opinion that, in order to convict appellee under the indictment of the offense charged, it must be made to appear from the evidence, beyond a reasonable doubt, not only that he unlawfully and wilfully committed the acts therein charged, but that they were committed with the intent on his part to hinder the objects of the election law, and either that

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they did so hinder them, or were reasonably calculated to result in such hindrance; for the language of section 1577, under which this indictment was found, is that to constitute the offense therein named the election officer must wilfully perform his duty "in such a way as to hinder the objects of this law." The statute (section 1475) in terms declares that the duties to be performed in assisting the illiterate, blind, and physically disabled elector to vote shall be discharged by the clerk of the election alone. Manifestly the performance of these duties should always be confided to the clerk by the other election officers, but we are not disposed to hold that an occasional or accidental performance of them by a judge or sheriff of election, through inadvertance or mistake, would make the latter an offender against the election law in the meaning of section 1577. The requirements of the election law should be fairly and fully complied with by those intrusted with the duty of conducting elections, and punishment surely and swiftly visited upon all, whether officers of election or individual electors, who wantonly and corruptly, by whatsoever means, prevent fair and free elections in the State; but it is not every failure on the part of election officers to comply with the requirements of the law in respect to elections that will justify the infliction of punishment. A mere failure of duty resulting from ignorance on the part of election officers might, and sometimes does, amount to such disregard of the essential requirements of the election law as to affect the validity of the returns and certificates made by them, and render the same so unreliable as to destroy their value, yet it would hardly be claimed that the election officers should be criminally proceeded against in every such case for the

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dereliction of duty. The wilful violator of the election law stands, however, upon a different footing. His wrongdoing, if shown according to the rules of evidence applicable to the criminal law, merits punishment, and should receive it.

Whether appellee belongs to the latter class must be determined by trial in the circuit court. With the question of his guilt or innocence this court, upon this appeal, has nothing to do. Our duty ends with the decision of the question raised by the demurrer to the indictment. We have considered, without indicating or discussing them in detail, the several objections urged by counsel for appellee to the indictment. In our opinion the allegations of the indictment as to the calling and holding of the primary election, and the appointment of appellee as a judge thereof, are not mere conclusions, as claimed by counsel, for they aptly state the facts according to the Criminal Code of Practice and sufficiently show that the primary election was called by the regularly organized, constituted, and governing committee of the Democratic party of the State; that 40 days' notice of the time and purpose of holding it was posted on the courthouse door and 20 other public places in Fayette county, as required by statute; and that appellee's appointment as judge of election was lawfully made by the governing committee of the party. The case of Commonwealth v. Maddox, 32 S. W. 129, 17 Ky. Law Rep. 577, cited by appellee, cannot, for the reasons hereinafter expressed, be accepted as controlling authority in this case. The quotations from the indictment appearing in the opinion of that case fail to show that the primary election was called by a committee at all. Only the words "duly and regularly acting governing authority" of Trimble

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county were used in the indictment. Whether the primary was called by a committee, a minority of the committee, or only the county chairman, does not appear. The same omission appears in the allegations of the indictment as to Maddox's appointment as election officer, and it wholly failed to allege that the statutory notice was given previous to the holding of the primary. It is patent therefore that the indictment in the Maddox Case is unlike the one in the case at bar. Be this as it may, it is further manifest that in the decision of that case the court overlooked section 131 of the Criminal Code, which provides: "In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, it is not necessary to state the facts constituting jurisdiction; but the judgment or determination may be stated as given or made, or the proceedings had. The facts constituting jurisdiction must, however, be established on the trial." The Supreme Court and other federal court cases cited by counsel for appellee as furnishing the standard by which the indictment under consideration should be tested cannot be accepted in this State as authority on mere questions of pleading and practice, when they conflict, as in this case, with our Code and the decisions of this court.

For the reasons indicated the judgment is reversed, and cause remanded, with directions to the lower court to overrule the demurrer, and for further proceedings consistent with the opinion.

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CASE 74.—ACTION BY THE COMMONWEALTH AGAINST CHATTANOOGA IMPLEMENT & MFG. CO TO RECOVER A PENALTY.—October 11.

Commonwealth v. Chattanooga Im' p. & M'f'g. Co

Appeal from Carlisle Circuit Court.

R. J. BUGG, Circuit Judge.

From a judgment dismissing the petition the Commonwealth appeals—Affirmed.

Corporations—Foreign Corporations—Business Within State—Appointment of Agent.—A foreign corporation sold a press to a purchaser in Kentucky, and, he having failed to pay for it, an attorney recovered judgment and bought in the press thereunder for the corporation, and afterward sold the press at private sale. Thereafter the corporation appointed a sales agent within the state, but he transacted no business under such appointment. Held, that the corporation had not carried on business within the state without appointing an agent and filing certain notices with the Secretary of State, as required by Ky. Stats. 1903, section 571.

N. B. HAYS, Attorney General, and C. H. Morris for appellant.

ROBBINS, THOMAS & BRIDGEWATER for appellee.

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

The Chattanooga Implement & Manufacturing Company is a corporation formed under the laws of Tennessee and residing at Knoxville. It did not comply with section 571, Ky. St. 1903, requiring all

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foreign corporations "carrying on any business in this State" to have an authorized agent here upon whom process may be served and to file certain notices with the Secretary of State. On October 24, 1906, the Commonwealth filed a petition against the company to recover the penalty provided for the violation of that section. The defendant filed an answer. The case was tried before the circuit court, which dismissed the petition; and the Commonwealth appeals.

It is unnecessary for us to determine whether the second paragraph of the answer of the defendant was sufficient. In the first paragraph it was pleaded that the defendant was not guilty. This was all that was necessary. Louisville & Nashville R. R. v. Com., 112 Ky. 635, 66 S. W. 505, 23 Ky. Law Rep. 1900. The proof introduced on the trial showed that on January 24, 1906, the company had made a contract with the Bardwell Hardware Company, by which it was to act as agent for the company at Bardwell, in Carlisle county, in selling its machinery; but the proof also showed that the Bardwell Hardware Company had done nothing as agent, that it had handled none of the machinery, and had solicited no purchasers. The proof, therefore, did not show that the company had carried on business in Carlisle county. It only showed the appointment of an agent for that purpose. The statute only includes corporations carrying on business in this State." The appointment of an agent is a step towards carrying on business; but, unless the agent acts under his employment, the business is not carried on in this State. The proof also showed that some years ago the company had sold a press in Carlisle county; that the purchaser failed to pay for it; that the claim was placed in the hands of an attorney for collection; that he sued upon

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it, and had the press sold, and bought it in for his client. This press, after he bought it in for his client, he had sold as a secondhand press in Bardwell at private sale. This, too, was not carrying on business in this State within the meaning of the statute. The seller had a right to collect his debt, and, when he had to buy in the property to save his debt, the reselling of the secondhand press privately to make the debt was not such a carrying on of business as the statute contemplates. Judgment affirmed.

CASE 75.—ACTION BY BETTIE PARRISH AGAINST THE LOUISVILLE & NASHVILLE R. R. CO. FOR DAMAGES TO HER STOCK BY FAILURE TO BUILD FENCES AND CONSTRUCT CERTAIN CATTLE GUARDS.—October 11.

Parrish v. Louisville & N. R. R. Co.

Appeal from Madison Circuit Court.

J. M. BENTON, Circuit Judge.

Judgment for defendant, plaintiff appeals—Affirmed.

1. Railroads—Fencing Right of Way.—The duty of a railroad company under Ky. Stats. 1903, section 1790, to construct a fence half the distance of the division line between the right of way and the land of an adjoining owner, when the landowner has constructed a fence for the other half, is limited by sections 1791, 1792, 1795, 1784, so that the land must be improved, or, if unimproved, must be inclosed on the other three sides, and the company must be notified in writing to

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construct its fence; which facts must appear in a complaint based on failure to construct such fence.

2. Same—Construction of Cattle Guards.—Under Ky. Stats. 1903, section 1793, providing that a railroad company shall construct cattle guards at terminal points of fencing constructed along its line, except at points where such line is not required to be fenced on both sides, and at public crossings, it cannot be required to erect cattle guards except at points where under the fencing law the construction of fencing may be required, nor till such fencing has been erected.

J. TEVIS COBB and C. H. BRECK for appellant.

NOTE BY REPORTER.

This opinion is in response to a petition for rehearing in the original case of Parish v. L. & N. R. R. Co., decided January 20, 1904, and reported in 25 Ky. Law Rep., p. 1524, and 78 S. W. 186, the original opinion having been withdrawn by an order of the Kentucky court of appeals.

J. A. SULLIVAN, BENJAMIN D. WARFIELD, and BRECKINRIDGE & SHELBY for appellee.

POINTS DISCUSSED AND AUTHORITIES CITED.

1. In this petition for rehearing it is argued that the opinion of the court in this case (25 Ky. Law Rep., 1524, 78 S. W., 186) in regard to the duty of the railroad company to erect and maintain cattle guards through appellant's open pasture, is not the law of this State. (Ky. Stats., section 1793; McKee v. C., N, O. & T. P. R. Co., 102 Ky., 253; L., H. & St. L. R. Co. v. Beauchamp, 21 Ky. Law Rep., 1476; Bemis v. Conn. R. Co., 1 Am. Rep., 339; Payton v. L. & N. R. Co., 24 Ky. Law Rep., 1896; Elliott on Railroads, 1196; Am. & Eng. Ency. of Law, vol. 7, pp. 906, 912; Rorer on Railroads, 616; Birmingham, etc., R. Co. v. Parsons, 27 L. R. A., 264.)

2. The court is in error in this case when it decides that under the law, the duty of the railroad company to erect a fence along its portion of the right of way arises without three months' notice in writing from the adjoining land owner. Under the law, a railroad company is required to build a fence only through improved or enclosed lands, and this duty does not arise until after the complaining land owner has erected a fence on one-half of the line, and otherwise complied with the statute on his part. (Ky.

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Stats., sections 1784, 1795; Payton v. L. & N. R. Co., 24 Ky. Law Rep., 1896; Am. & Eng. Ency. of Law, 890; O. & N. R. Co. v. Courts, 22 Ky. Law Rep., 672; Younger v. L. & N. R. Co., 19 Ky. Law Rep., 506.)

3. The fencing statutes are an exercise of the police power of the State, and, under the present law, the land owner is not vested with the power to determine on which side of the railroad right of way the company shall erect a fence and require it to erec same on one entire side. Such a statute would be unconstitutional. The present statute, where fencing is required under the law, provides that each shall construct "one-half of the distance of the division line" on each side of the right of way. (Ky. Stats., sections 1790, 1791; O. & N. R. Co. v. Todd., 91 Ky., 175.)

4. The plaintiff's petition as amended is fatally defective, because she fails to allege that she on her part had complied with the law before suit filed. She also fails to negative the exceptions embodied in the statute, which excuse the railroad company from erecting a fence except under certain conditions and after certain things have been done by the complaining land owner. (Ky. Stats., sections 1780, 1799; Belcher v. L. & N. R. Co., 89 Ky., 193; Wills v. Walters, 5 Bush, 352; Younger v. L. & N. R. Co., 19 Ky. Law Rep., 506.)

5. The damages in this case are impossible of accurate ascertainment, and too remote to constitute the basis of recovery. The wife is not entitled in Kentucky to the time and services of her husband, as a matter of law.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

This appeal brings before us for construction the law relating to railroad fences and cattle guards. The appellant in this action sought to recover damages for injuries sustained by her stock caused by the alleged failure of the appellee company to erect fences and cattle guards in the manner provided in the Kentucky Statutes. A demurrer was sustained to the petition as amended and reformed, and, from the judgment dismissing it, this appeal is prosecuted.

It is averred in the petition that appellee owns and

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operates a railroad through the farm of appellant; that on one side of the railroad appellant constructed a fence extending more than half the distance on the division line between appellant and that of the company, and notified the company, but not in writing, to erect a fence on the other half of the line. The company failed and refused to erect any part of the fence. It is further alleged that the company built two cattle guards, but erected them in an insufficient manner and at improper places.

We will first consider so much of the petition as related to fencing. Section 1789 of the Kentucky Statutes of 1903 provides that: "When any corporation * * *owns right of way, and its railroad shall have been constructed and in operation for the period of five years, the same is hereby put on equal terms and obligations with other landowners owning adjoining lands in this commonwealth." Section 1790 that: "Every such corporation or person owning or controlling and operating a railroad in this commonwealth, and owning right of way, shall construct and maintain a good and lawful fence on one-half of the distance of the division line between such rights of way and the adjoining lands, except as is hereinafter provided. * * *" Section 1791 that: "When either party, either the corporation or person owning or controlling and operating such railroad, or the owner of lands adjoining the right of way thereof, has constructed or does construct a good and lawful fence on the division line between such right of way and the lands adjoining the same for one-half the distance of said line, and the other party has not constructed such fence on said line for half the distance thereof, nor has paid a sum sufficient to construct said fence or any sum herein provided, shall in writing notify

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the party in default of the length of the division line between them, and that the party serving such notice has constructed a good and lawful fence on said division line for one-half the distance thereof; and it shall be the duty of the party on whom such notice is served, and he is hereby required, to construct a good and lawful fence on the other half of the distance of said division line, within four months after date of receiving said notice.* * *" The section further fixes a penalty that may be recovered by warrant upon the party upon whom notice is served if he or it fails to construct the necessary fences within the time prescribed. Section 1792, in part, provides that: "Nor shall such corporation or person be required to construct said fences as hereinbefore provided through unimproved and uncultivated lands, until the owner of such lands shall have previously enclosed said lands on three sides with sufficient fences, or unless such land be enclosed with fence and a river, creek, bluff or other natural barrier as will prevent the egress of stock." Section 1793 that: "All corporations and persons owning or controlling and operating railroads as aforesaid shall erect and maintain cattle guards at all terminal points of fencing constructed along their lines except at points where such lines are not required to be fenced on both sides, and at public crossings. But, where there is a private passway across said railroad, the land owner for whose benefit it is kept open shall bear one-half of the expense of such cattle guards and gates,—the former to erect the gates, the corporation or person operating the railroad to erect the cattle guards." Section 1795 that: "All laws and parts of laws governing the construction of farm fences are held hereby to apply to railroad fences in all cases where,

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by the provision of this act, railroad corporations are required to fence their right of way." This statute is an act of February 25, 1893. An act of February 20, 1893 (Laws 1893, p. 491, c. 148, section 5), now article 1 of chapter 48 of the Kentucky Statutes, relates particularly to farm fences; and provides, in section 1784, that "when a division fence is desirable or is made necessary by the division of improved or inclosed lands, or when no fence or no division fence exists between the improved or inclosed lands of adjoining owners, or lands where the right of way is owned by one party, either party may after he has built a lawful fence upon his proportion of the line to require the other to erect a lawful fence out of planks, wires, rails, or wire and plank, upon his proportion of the line, and, if he fail to do so after three months notice in writing, may erect such fence and recover from the recusant the cost thereof, * * * but nothing herein shall be construed to conflict with an act requiring railroad corporations and other persons owning and operating railroads and land owners to fence their right of way and railroad track, and to construct barriers and cattle guards at certain public roads and highway crossings, and to maintain and keep the same in repair; and prescribing the remedies and penalties for failing to do so." Section 7 of the act (Laws 1893, p. 521, c. 152), now section 1795 of the Kentucky Statutes, as it originally stood, read: That "for the purpose of this act, any fence constructed of substantial posts well set, not less than two feet in the ground and at no greater distance apart than ten feet, with wire not less than four and one-half feet high, consisting of seven strands, shall be held to be a good and lawful fence; but, nothing herein shall be construed to prevent parties from

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erecting any other class of lawful fences." By an act of 1900 (Laws 1900, p. 40, c. 11) this section was repealed, and, in lieu thereof, section 1795 as above set out was enacted. This court in Owensboro & Nashville R. Co. v. Courts, 109 Ky. 154, 58 S.W. 521, 22 Ky. Law Rep. 672, in construing this statute, held that it was the legislative intention to put railroads upon an exact footing with other landowners in the construction of division fences, subject to the exceptions contained in the law. When this case was decided, section 1795 of the original act had not been repealed by the act of 1900; but the act of 1900, now section 1795, makes plain the legislative intent upon this subject, and there can be no longer any question that the statutes governing the construction of farm fences applies to railroad fences.

It is argued, however, that under section 1790 it is the absolute duty of the railroad company to construct and maintain a fence on one half the distance of the division line when the adjacent owner has erected a fence on one half the distance. If this section stood alone, or was not to be read or considered in connection with the other sections of the law, there would be much force in this contention. But, this act—in fact both acts, the one relating to farm fences as well as railroad fences—must be read as a whole; and, when so construed, this section merely declares what is the abstract duty of the railroad company and landowner in respect to the reciprocal obligations imposed upon each according to the other sections of the law. This view is we think made clear by the fact that other sections contain exceptions and reservations that would be entirely unnecesary, indeed, meaningless, if the duty to fence was imposed without qualification by section 1790. The general purpose

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of the law was to place railroad companies and adjoining landowners on precisely the same footing imposing upon each the same duties and obligations. What the railroad company can require the landowner to do the landowner can compel the railroad company to do. Neither party can be required to erect fences parallel with the railroad unless the land is improved or inclosed, or, if not, until the land has been inclosed on three sides with sufficient fences; or there is a river, creek, bluff, or other natural barrier that will prevent the egress of stock. When land is improved or inclosed, or is inclosed on three sides by fences or natural barriers, but there is no fence along the line of railroad, the landowner or the railroad company may construct a fence parallel with the railroad on the line between the right of way and the adjacent owner for one-half the distance of the line, and when this has been done the party who has constructed the fence may in writing notify the party in default of the length of the division line between them, and that he has constructed a good and lawful fence on the division line for one-half the distance thereof, thereupon it shall be the duty of the party upon whom the notice is served to construct a good and lawful fence on the other half of the distance of said division line within three months after the date he received the notice. If the party who has been duly notified fails to construct a fence within the time prescribed, such party may be fined $1 for each day after the expiration of the period of four months during which the fence has not been constructed. In addition to this penal liability, the party who has erected a fence on one-half the division line may after the expiration of three months from the service of notice proceed to erect a fence on the other party's proportion of the

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line, and recover from him the cost thereof. The construction of division fences is altogether a creation of the statute, and the party who desires to invoke the statute in his behalf must show that he has performed the conditions precedent necessary to enable him to set it in operation against the delinquent. So that the party who desires fencing to be erected on the line between the railroad company's land or right of way and that of the adjacent owner cannot compel the other party to erect any portion of the fence until and unless he makes it appear that there has been erected by him on one-half the distance a sufficient fence, nor until he gives notice in writing of this fact to the other party. If the land through which the railroad runs is unimproved and uncultivated land, neither party can be required to erect a fence parallel with the railroad until the lands of the adjacent owner shall have been previously inclosed on three sides with sufficient fences or with natural barriers; but, if the adjacent land is inclosed or improved, then either party may require the other to erect a fence upon the terms herein indicated.

The petition of plaintiff was fatally defective in two particulars—it did not allege that written notice was given, or that the land through which the railroad run was improved land, or, if unimproved and uncultivated, that it was inclosed on three sides with sufficient fences or such natural barriers as would prevent the egress of stock. Cattle guards are required to be erected and maintained by the corporation at all terminal points of fences constructed along their lines and at public crossings, except at points where the railroad is not fenced on both sides. In other words, cattle guards can serve no useful purpose unless the railroad right of way is fenced on both sides. It

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would be folly to have cattle guards without parallel fencing. The only purpose of cattle guards is to keep cattle from entering and straying on the right of way of the company, and, of course, if the right of way is not fenced, cattle guards could not possibly accomplish this object. If there was a parallel line of fencing on each side of the railroad, this would not protect the right of way from the trespass of stock unless cattle guards were erected at the terminal points of fences and on each side of the public roads that cross the railroad; as, in the absence of cattle guards, stock on the public road could enter upon the right of way of the railroad at every public crossing, and, where the parallel fencing terminated, they would also enter unless prevented by cattle guards. It necessarily follows from this conclusion that the company cannot be required to erect cattle guards except at points where under the fencing law either the company or the owner may require fencing to be constructed; nor can their erection be demanded until such fencing has been erected. When parallel lines of fencing have been constructed along both sides of the railroad, then it becomes the duty of the company to erect cattle guards at public crossings and at the terminal points of fencing; and, if delinquent in this respect, the company may be required to respond in damages to any person whose stock has been injured or killed by its failure to erect and maintain them. McGhee v. Gains, 98 Ky. 182, 17 Ky. Law Rep. 748, 32 S. W. 602; McGhee v. Guin, 98 Ky. Law Rep. 209, 17 Ky. Law Rep. 794, 32 S. W. 615; L. H. & St. L. R. Co. v. Beauchamp, 108 Ky. 47, 55 S. W. 716, 21 Ky. Law Rep. 1476.

We think the foregoing views are fully supported by the opinion in McKee v. C., N. O. & T. P. Ry. Co.,

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102 Ky. 253, 43 S. W. 241, 19 Ky. Law Rep. 1270, where the court, in a case involving the cattle guard statute, said: "The purpose of the law is to have the roadway entirely fenced up for the protection of the traveling public, though protection to stock is also secured by the statute, for it is where the right of way is not fenced that the landowners with division fences between them would need cattle guards, and where the statute would require them if its purpose was to compel the company to inclose the lands of adjoining owners. The remedy of the landowner is to build his fence along the right of way and require the company to do likewise. Then no cattle guards will be needed except at public and private crossings, and this the statute requires, and at the terminal points in the parallel fencing along the right of way, and this is what the statute demands. These points are not necessarily between the property lines of the various owners, but are wherever the lateral fencing for any reason stops, and where from the want of cattle guards at the stopping places the road under fence would be left open for trespass. Whenever the track leaves ground which the company is bound to fence and passes onto ground which the company is not bound to fence there must be cattle guards placed so as to completely fence in the track. The company, not being under any legal obligation to maintain cattle guards at the points of entering and leaving the complainant's farm merely because they were dividing lines with his neighbors, might remove them at any time." Under this construction of the statute, the rights of the landowner are fully protected. If he desires fencing between his land, that is improved or inclosed, or inclosed on three sides by fences or barriers, and that of the railroad company,

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all that he need do is to erect a sufficient fence on one-half the division line, and then he may by observing the directions of the statute require the company to erect the other one-half. In the case before us, as the right of way of the railroad was not inclosed on both sides by parallel fences, cattle guards were not required. Hence appellant cannot recover damages for the failure of the company to erect them.

Wherefore the judgment of the lower court is affirmed.

NUNN, J., dissents.

CASE 76.—PROCEEDING BY THE COMMONWEALTH BY THE SHERIFF OF BRACKEN COUNTY, AGAINST MARTHA A. RYAN'S EXECUTORS TO LIST CERTAIN OMITTED PROPERTY FOR TAXATION.—October 11.

Commonwealth, ex rel. Cummins, Sheriff, v. Ryan's ex'r

Appeal from Bracken Circuit Court.

JAMES P. HARBESON, Circuit Judge.

Judgment for defendants, plaintiff appeals—Reversed.

1. Executors—Actions Against Executors—Statutory Provisions—Time to Sue—Limitations.—A proceeding by the sheriff in the county court under Ky. Stats. 1903, section 4241, to require the personal representatives of a deceased taxpayer to list property omitted from assessment, was not an action within Ky. Stats., 1903, section 3847, prohibiting the bringing of any action, other than to settle the estate, against a decedent's estate within six months of the qualification of its

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personal representative; the proceedings being merely a manner of assessing property, and not in essence judicial.

2. Same—Suits by the Commonwealth.—Statutory provisions limiting the time within which actions can be brought against the personal representatives of a decedent do not apply to the commonwealth, unless by their express terms or their necessary implication it is clear they were meant to so apply.

M. J. HENNESSEY for appellant.

AUTHORITIES CITED.

Ky. Stats., sections 3847, 2515, 2523, 4241; Cooley on Taxation, vol. 1, pp. 19, 21; Commonwealth v. Arnold, 80 Ky., 135; Commonwealth v. Nute, 72 S. W., 1090.

GEORGE DONIPHAN for appellee.

AUTHORITIES CITED.

Session Acts 1906, ch. 22, p. 58, and especially 228. Ky. Stats., sections 3847, 4021, 2523, 4241, 3860, 469, 3870, 3871, 3872, 3873 and 3874; Chicago, St. L. & N. O. Ry. Co. v. Commonwealth, 115 Ky., 278, Gay, etc., v. City of Louisville, 115 Ky., 239; Commonwealth v. Nute, 72 S. W., 1090.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

This proceeding in the county court to require the personal representatives of a deceased taxpayer to list property which had been omitted from assessment was begun within a week or so after the taxpayer's death and the qualification of the executors of her will. It was dismissed because the court deemed it had been brought in violation of section 3847, Ky. St. 1903, prohibiting the bringing of any action other than to settle the estate against a decedent's estate within six months of the qualification of its personal representative. The circuit and county courts each took the position that the word "action"

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used in section 3847 embraced this proceeding. If they were correct, then the effect is to stay the assessment of omitted-property which belonged to the taxpayers since deceased till at least six months after their death, no matter when the omission occurred. Section 469, Ky. St. 1903, construing terms used in the statutes, provides: "The term 'action,' when used in this revision, shall be construed to include all proceedings in any court in this Commonwealth." By virtue in part of this section, this court held that such proceedings were barred by limitation after five years, because "actions" based upon a statutory liability were specifically barred after that time, and applied by the terms of another statute to the Commonwealth, as well as to individuals. Chicago, St. Louis & N. O. Ry. Co. v. Commonwealth, 115 Ky. 278, 72 S. W. 1119, 24 Ky. Law Rep. 2124; Commonwealth v. Nute, 115 Ky. 239, 72 S. W. 1090, 24 Ky. Law Rep. 2138. A further study of the question presented in this case will shed light upon the legislative purpose in the enactment of the assessing and limitation statutes. The Constitution requires that all taxes shall be paid uniformly. The basis of every tax involves necessarily an assessment of the property subject to the tax. All property that is subject must pay the same rate for the same period, or the result would be not uniform. Legislation has made it the duty of the taxpayer to list his property with the county assessor for taxation. Sections 4023, 4064, Ky. St. 1903. Failing in this, several methods are then provided by any one of which the assessment may be made notwithstanding. One is for the assessor to make the assessment, if he has sufficient knowledge or can gather sufficient evidence. Section 4053, Ky. St. 1903. If he should

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fail, then the county board of supervisors may make the assessment. Section 4120, Ky. St. 1903. These provisions and others by which the clerk of the county court upon complaint of the assessor may cite a recusant taxpayer to list his property before the county court. Section 4061, Ky. St. 1903. All refer to taxes of the year current with the act. The failure of any or all these officials and the taxpayer to act in no sense relieves the latter from his liability, nor exhausts the resources of the taxing authority to make a valid assessment. Assessments are required to be made as of the 1st of September. Article 2, section 4, p. 96, Acts 1906, for the ensuing year. The liability to assessment is fixed as of that date against the then owner. Chapter 130, section 1, p. 321, Acts 1904. The assessor is given until on or before the 1st day of January following to complete the assessment of his county. Article 2, section 19, p. 110, Acts 1906. Suppose the taxpayer died on September 2d, could not the county assessor or the board of supervisors make the assessment? If they were stayed for six months by virtue of this statute, they could not; for neither has authority over the matter for that length of time. Advancing the consideration another step, if the taxpayer fails to list the property, then it is deemed omitted property. By section 4241, Ky. St. 1903, it is made the duty of the sheriff of the county or of the auditor's agent to "cause to be listed for taxation all property omitted by the assessor, board of supervisors," etc. The section provides the manner of causing the omitted property to be listed. The official files a statement in the county clerk's office. A summons is issued upon it to the delinquent taxpayer. "At the next regular term of the county court after the notice has been

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served for five days, if it shall appear to the county court that the property is liable to taxation, and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as is required by law; if it is not liable he shall make an order to that effect."

Is this an "action" within every meaning of the statute? It has been held that the county court acts ministerially in assessing property under this statute. Baldwin v. Hewitt, 88 Ky. 673, 11 Ky. Law Rep. 199, 11 S. W. 803; Cassidy v. Young, 92 Ky. 227, 13 Ky. Law Rep. 512, 17 S. W. 485. So far the proceeding is in no sense different from that of any other assessing officer's action. If the assessment is made, then the taxes are collected, not under the judgment of the court, or by execution or by any process issuing out of the court, but by the collector of taxes as all other taxes are required to be collected. The proceeding then is an assessment only, pure and simple. There are only two features of section 4241 that seem to indicate that the proceeding is of that judicial character which was evidently in mind in the enactment of section 3847, supra. One is the expression: "From so much of the order of the court deciding whether or not the property is liable to assessment either party may appeal as in other civil cases." The other is the infliction of a penalty of 20 per cent, and costs upon the recusant. We think the expression just quoted means to describe the manner of prosecuting an appeal in the matter, rather than to classify it as a civil action. The infliction of the penalties is not a recovery against the taxpayer. It is not dependent upon the discretion of the court, or subject to be denied or abated. It is in the same category as the tax itself, imposed by the same authority, and collectible

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at the same time and in the same manner. It is incurred the moment the offending taxpayer fails finally to list his taxable property with the proper assessing officer within the time allowed by statute, and attaches as a statutory liability just as the tax does. Nor does the proceeding in the county court affect the liability of the taxpayer for it further or in a different sense than if the assessment of the omitted property were then done by some other officer or tribunal. The inhibition of section 3847 is against proceedings that are judicial in their nature, not ministerial acts. The section reads: "Six months must run, after the date of the qualification of the first personal representatives of a decedent's esctate by a court of this Commonwealth, before an action shall be commenced against any executor or administrator thereof, except to settle the estate or against an executor de son tort. Any action brought in violation of this section shall be dismisssed." Now, suppose any interested party should move the county court to require the personal representatives to give additional surety on his bond (section 3839, Ky. Stats. 1903) or to file his inventory (which must be done within three months under section 3849, Ky. Stats. 1903) could not these proceedings be entertained within six months of the personal representatives qualification? What the Legislature had in mind in enacting section 3847 evidently was to allow the personal representatives a reasonable time within which to marshal the assets of the estate, so that it could be fairly and safely determined whether they were sufficient to pay all creditors in full, and, if not, to prorate the assets according to law. But taxes stand upon a different footing. They are not debts. They have priority over all debts and exemptions. The necessities of government require

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their prompt payment. To that end drastic and summary methods of collection are provided. No delay is given a decedent's estate in paying taxes already assessed. Nor does the death of the taxpayer stay the collector from distraining immediately after the taxes are due. It is inconceivable, then, why the Legislature should have intended a suspension for six months of the right of the Commonwealth to complete its assessment against estates of deceased taxpayers when necessary to be done through the instrumentality of the county court, yet not suspend the assessment when done otherwise, or the collection of the taxes by distraint.

Provisions of this character are not deemed to apply to the Commonwealth, unless by the express terms or the necessary implication of a statute. The reason the limitation statutes of this State do apply to such proceedings is because the statutes expressly so provide. C., St. L. & N. O. Ry. Co. v. Commonwealth, supra, and Commonwealth v. Nute, supra

The judgment of the circuit court is reversed, and same remanded for further proceedings not inconsistent with this opinion

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CASE 77.—PROCEEDINGS BY C. S. MORELAND AGAINST THE CHESAPEAKE STONE CO TO CONDEMN A TRAMWAY.—October 11.

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Chesapeake Stone Co. v. Moreland

Appeal from Carter Circuit Court.

M. M. REDWINE, Circuit Judge.

From a judgment of the Circuit Court affirming a judgment of the County Court defendant appeals.—Affirmed.

1. Eminent Domain — Condemnation Proceedings — Judgment.—Under Acts 1904, p. 313, c. 126, section 3, relating to roads and passageways, providing that appeals to the circuit court shall be tried de novo upon the confirmation of the report of the commissioners in the county court or the assessment of damages by that court, in the disposition of proceedings for the establishment of a private tramway over the property of another, the circuit court should enter a final judgment fixing the rights of the parties and awarding compensation, without reference to the action taken in the county court; but where the judgment of a county court defined with precision the rights of the parties, and awarded compensation to be paid before the tramway could be taken possession of, judgment of the circuit court on appeal that the appellee "is entitled to the tramroad adjudged by the C. county court, and the report of the reviewers therein is confirmed," is sufficient.
2. Same—Right to Take Property—Public Use.—Property is not taken for a public use unless the public has some right to use and enjoy the property taken, as distinguished from the absolute control of the individual; and an individual cannot for his own use take private property of another, however needful or convenient it may be, unless it is necessary to enable him to perform some public service; but, if the public

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has the right to use it upon the same terms as the person at whose instance it was taken, it is a public use.

3. Same.—The fact that public interest will be promoted by a contemplated improvement will not, except in the case of mills, authorize the taking of private property, in the absence of the right on the part of the public to participate in the enjoyment of the property taken.

4. Same—Determination of Question as to Validity of Exercise of Power—Jurisdiction of Courts.—Whether a particular use is public or private is a question for the judiciary, and the courts have an undisputed right to determine whether the legislature has passed the limits provided by the Constitution, and that without reference to the character of the legislation enacted.

5. Constitutional Law—Statutes—Construction—Determination of Validity.—If there is doubt as to the validity of a statute, it will be upheld; and, if it is capable of two constructions, one of which will uphold and the other destroy it, that construction will be adopted which will uphold it.

6 Eminent Domain—Public Use—Private Tramway.—Acts 1904, p. 311, c. 126, amending Ky. Stats. 1903, section 4348, so that land may be condemned for a private tramroad to enable one to reach railroad switches, etc., for the purpose of marketing the products of certain quarries, etc., and providing that nothing in the act should be construed so as to give any person, etc., exclusive use of such passage, but that other persons, etc., should have the right to use the same upon paying proper compensation therefor, is not unconstitutional as taking property for other than public use, since others have the absolute right to use it upon the condition stated.

THEOBALD & THEOBALD for appellant.

The right of eminent domain is the right of a state or nation, or of those to whom the right and power has been lawfully delegated, to condemn private property for public use and to appropriate same for such use upon paying the owner just compensation to be ascertained according to law. West River Bridge Co. v. Dix, 6 Howard (U. S.), 507, 536; 12 Law Ed., 535. This being the full scope of the doctrine of eminent domain, the sovereign cannot exceed it or delegate any further right to take the private property of the citizen. Therefore, the legislature has no authority to grant to private or other persons the right to take private property for anything short of public use.

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AUTHORITIES CITED.

Shake v. Frazier, 94 Ky., 143; First Lewis on Eminent Domain, 2d Ed., 158; Constitution of Ky., section 242; Highland Bay Gold Mining Co. v. Strickley, 28 Utah, 215; Shall v. Gorman Coal Co., 118 Ill., 427; Acts Ky. Legislature 1904, ch. 126, section 1; Ky. Stats., sections 4289, 4290.

HENRY L. WOODS for appellee.

The act of the Kentucky legislature under which this proceeding was had, under chapter 126, Acts of the General Assembly of 1904 (see Acts 1904, p. 311), is not an act allowing the taking of private property for private use, as stated by appellant. But it is simply an act permitting a private person to condemn a right to use a part of another's land for certain purposes. In fact, it only gives an easement, and it may be used by any other person, and is not a private use at all, but a private person may condemn it for the use of himself and others. The act provides that it shall not operate so as to give any person, firm or corporation, exclusive use of said passage, but that any other person, firm or corporation, shall have the right to use it by paying compensation therefor, and if not agreed upon, then by condemnations proceedings."

OPINION OF THE COURT BY JUDGE CARROLL.—Affirming.

Appellee instituted a proceeding in the Carter county court in the manner provided by an act to amend an act relating to roads and passways, found in Acts 1904, p. 311, c. 126. The county court entered the following judgment: "It appearing to the satisfaction of the court from the report of the commissioners herein that it is necessary for the petitioner, C. S. Moreland, to have a private tramway over the lands of the said Chesapeake Stone Company to get her stone from her stone quarry to the Chesapeake & Ohio Railway Company's track, and that from said report, no other evidence being offered, $100 is a rea-

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sonable compensation for the land to be taken for the same as hereinafter described and for any damage to adjacent land by reason of said private tramway, it is now ordered and adjudged that the said report of the commissioners be and the same is hereby confirmed; and it is further adjudged that the petitioner, C. S. Moreland, is entitled to the possession of the land as described by said commissioners: Beginning at a post in a wire fence between said Moreland's land and the land of the Chesapeake Stone Company (a stake); thence S. 58¼° W., 462 feet, to a stake; thence———61½° W., 203 feet, to a stake 50 feet north of the center of the Chesapeake & Ohio railway track; thence, beginning at the same wire fence and at a point N. 31¾° E., 20 feet from the first beginning point, at a stake; thence S. 58¼° W., running parallel with said first line, to a stake 50 feet north of the center of Chesapeake & Ohio railway track and to where it strikes the first line—said land being 20 feet in width. The possession of said land is to be for the use herein mentioned—that of a private tramroad. But it is adjudged that, before said land be taken by the petitioner for said purpose, said petitioner shall pay or offer to pay the said Chesapeake Stone Company the sum of $100 for the same." From this judgment the Chesapeake Stone Company prosecuted an appeal to the circuit court and filed in that court a transcript of the record made in the county court. This record was introduced as evidence, and a witness was introduced who testified that since the proceedings in the county court C. S. Moreland had sold the land upon which the tramway was to be located to the Norton Iron Works Company, reserving the roadway over the land so sold to be used for any purpose she desired. The land sold to the Norton Iron Works

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Company is between the land of the Chesapeake Stone Company and the land originally owned by C. S. Moreland. There is a stone quarry on the land of C. S. Moreland, and also on that sold by her to the Norton Iron Works Company. No other evidence was introduced by either party. Thereupon the circuit court entered the following judgment: "This cause coming on for trial, and the court having heard all the evidence offered, and the argument of counsel, and being sufficiently advised, orders and adjudges that each and all of the motions and exceptions filed herein by appellant in the Carter circuit court on July 31, 1906, and in the Carter county court on March 3, 1906, be and they are hereby overruled, to which ruling of the court the appellant objected and excepted at the time said rulings were made; and it is adjudged by the court that the appellee, C. S. Moreland, is entitled to the tramroad adjudged by the Carter county court, and the report of the reviewers therein is confirmed. To which judgment of court appellant objected and excepted at the time."

The act provides that "either party may appeal to the circuit court by executing bond as required in other cases within thirty days, and the appeal shall be tried de novo upon the confirmation of the report of the commissioners in the county court or the assessment of damages by said court as herein provided." Section 3. The first objection made by appellant is that in a proceeding under this act the circuit court must do more than confirm the judgment of the county court, as was done in this case; that the proceeding must be determined in the circuit court without reference to what takes place in the county court, and judgment entered in the circuit court fixing or defining the rights of the parties and awarding compensation that

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shall be paid for the tramway as ordered. It is said that the judgment of the circuit court does not fix or define the rights of the parties, or award compensation, but merely confirms the judgment of the county court. In the disposition of proceedings of this character the circuit court should enter a final judgment fixing the rights of the parties and awarding compensation, without reference to the action taken in the county court. But in substance and effect the circuit court entered as its judgment the judgment of the county court; and, as the judgment of the county court defined with precision the rights of the parties and awarded compensation to be paid before the tramway could be taken possession of, no question can arise as to the meaning and effect of the judgment of the circuit court. The argument of counsel for appellant that the circuit court did not award any compensation is not well taken, because the judgment of the county court, which was adopted by the circuit court, provides in terms that, "before said land shall be taken by the petitioner for said purpose, said petitioner shall pay or offer to pay said Chesapeake Stone Company the sum of $100." It is therefore clear that, under the judgment of the circuit court, appellee cannot take possession of the property until the compensation allowed has been paid.

A more serious question is presented in the contention that the act of 1904 is unconstitutional. Under the Revised Statutes adopted in 1852, when it was necessary for a citizen to have a private passway over the land of one or more persons in the county to enable him "to attend courts, elections, a meeting house, a mill or warehouse," he might have a passway condemned and established. The General Statutes adopted in 1873 added to the uses for which a private

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passway might be established the right to condemn to enable a citizen "to pass from one tract of land to another owned by him, or to a railroad depot most convenient to his residence." By subsequent acts embraced in section 4348, Ky. St. 1903, ferries and steamboat landings were included. By the act of 1904, which is an amendment to section 4348 of the Kentucky Statutes of 1903, the uses for which private ways might be condemned was again extended, so as to allow the establishment of "a private tramroad or haul road over the land of one or more persons to enable him to reach a warehouse, steamboat landing, ferry, railroad switch, or navigable stream, for the purpose of marketing the products of a lead mine, iron works, salt works, coal mine, fire clay, and other minerals, oil wells, stone quarry, sand bank, or merchantable forest timber." This section also provides that "nothing in this act shall operate to give any person, firm or corporation exclusive use of such passage; but any other person, firm or corporation shall have the right to use the same upon paying proper compensation therefor; if no agreement can be made for such compensation, then the right to such use may be condemned as herein provided." It will thus be seen that the Legislature has gradually been enlarging the uses for which private property may be taken. Our Constitution does not define what is "public use," merely providing in section 242 that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by them"; and this provision was in substance in each of the preceding Constitutions, and may be found in the Constitution of nearly all the states of the Union.

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Under these constitutional provisions it is said by Judge Cooley, in Constitutional Limitatons (page 503), "to be conceded on all hands that the Legislature has no power in any case to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit." There is, however, a difference of opinion held by the courts as to what constitutes a public use, some of them ruling that, if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the Legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose; in other words, holding that whatever is or may be beneficially employed for the community is a public use. On the other hand, numerous cases hold that to constitute a public use the property must be taken into the direct control of the public or public agencies, or the public must have the right to use in some way the property appropriated. Indeed, so conflicting are the authorities upon what constitutes a public use that Judge Cooley, in his Constitutional Limitations (page 766), deemed it proper to remark that "we find ourselves somewhat at sea, however, when we undertake to define in the light of judicial decisions what constitutes a public use"; and any person who undertakes to arrive at a satisfactory conclusion from an investigation of the authorities will find himself in the same condition as Judge Cooley.

Some of the courts hold that the establishment of of private roads or ways like the one here in question are deemed inhibited by constitutional provisions

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similar to ours. Sholl v. German Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379; Osborne v. Hart, 24 Wis. 89, 1 Am. Rep. 160; Wild v. Dieg, 43 Ind. 455, 13 Am. Rep. 399; Welton v. Dickson, 38 Neb. 767, 57 N. W. 559, 22 L. R. A. 496, 41 Am. St Rep 771. In others they are allowed. Latah County v. Peterson, 3 Idaho, 398, 29 Pac. 1089, 16 L. R. A. 81; Shearman v. Buick, 32 Cal. 241, 91 Am. Dec. 577. In the editorial notes to Beekman v. S. S. R. Co. (N. Y.) 22 Am. Dec. 686, and to Lynch v. Forbes (Mass.) 42 Am. St. Rep. 402, and Chicago R. R. Co. v. Morehouse (Wis.) 88 Am. St. Rep. 919, the authorities on this point are collected and commented upon. Indeed, the courts in several states seem to have adjudged the question in such manner as was best adapted to the needs and wants of the people. In discussing this question, Lewis on Eminent Domain, section 165, says: "Public use means use by the public; and this, it seems to us, is the construction the words should receive in the constitutional provision in question. The reasons which incline us to these views are, first, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation, or renders them capable of any definite or practicable application. If the Constitution means that private property can be taken only for use by the public, it affords a direct guide for both the legislature and the courts."

This view seems to have been adopted by this court in the well-considered case of Robinson v. Swope, 12 Bush, 21, where it is said: "The citizen may occupy

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and use his land in any lawful manner he chooses, subject only to the right of the public to take it upon consideration previously made for some public use; that is, to be occupied and enjoyed by the public, or for some use necessary to enable the public to command the services of citizens, or to enable the citizen to perform his duties to the public." And in this view we concur; our opinion being that the public must have some right to use and enjoy the property taken, as distinguished from the absolute control of the individual. In other words, an individual, for his own use and benefit, unless it be necessary to enable him to perform some public service, cannot take the private property of another, however needful or convenient to him the use might be. It seems entirely probable that only a few persons aside from the individual at whose instance it was established will have occasion to use this tramway; but this fact does not destroy its public use in the meaning of the Constitution. It is not the number of people who use the property taken under the law of eminent domain that constitutes the use of it a public one; nor does the fact that the benefits will be in a large measure local enter into the question. In short, according to the generally recognized rule, the length of the public way, the places between which it runs, or the number of people who use it, is not the essential inquiry. The controlling and decisive question is: Have the public the right to its use upon the same terms as the person at whose instance the way was established? If they have, it is a public use; if they have not, it is a private one. If the owner can exercise the same kind of dominion over it as he does over other property owned by him, if he can close it up, if he can prohibit all or any part of the public from its use, then it is clear

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that its establishment would be private and not public; and the right of eminent domain could not be invoked in its creation. Nor is the fact that the public interest will be promoted by the contemplated improvement sufficient to authorize the taking, in the absence of the right on the part of the public to participate in the enjoyment of the property taken. If public use was construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or other like improvement he contemplated erecting or establishing would result in benefit to the public, and under this rule the property of the citizen would never be safe from invasion.

Although our court has sustained the right to take private property when necessary to enable the citizen to perform a public duty or service, and to permit the establishment of mills, it has never sanctioned the taking for any other purpose, unless the public had a right to use the property taken. In fact, with the single exception of mills, the right of the individual to take property for an enterprise or improvement, in which the public had no rights other than those that flowed from the advantage they might enjoy from the conduct or operation of the property, has never been approved; and mills so erected have always been subject to legislative control and supervision (Ky. St. 1903, section 2721), the same as railroads and turnpikes, and upon this theory the taking of property for their establishment may be justified. In Robinson

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v. Swope, supra, and in the later case of Shake v. Frazier, 94 Ky. 143, 21 S. W. 583, 14 Ky. L. R. 798, the provision of the statute allowing a passway to be condemned so as to allow a citizen "to pass from one tract of land to another owned by him," was considered by the court, and this part of the statute held invalid upon the ground that it was taking property for a purely private purpose. But the validity of so much of the statute as allowed the establishment of a passway to a steamboat landing, warehouse, ferry, or railroad depot has never been called in question by the courts, although it has been a part of the law of the state for many years.

The acquiescence for so long a period of time in the validity of these enactments is urged in support of the argument that the courts of this State have adopted the theory, prevailing in some jurisdictions, that it is for the Legislature to say whether the use is a public one or not, and that when it has authorized, as in the case before us, the establishment of a road by invoking the right of eminent domain, its judgment is binding upon the courts. But the weight of authority is decidedly against this view, and this court, in Tracy v. E. L. & B. S. R. Co., 80 Ky. 259, 3 Ky. L. R 813, following the general current of opinion, declared that whether a particular use is public or not, within the meaning of the Constitution, is a question for the judiciary Of the correctness of this proposition we entertain no doubt. The courts have the undisputed right to declare when the Legislature has passed the limits provided by the Constitution, and this without reference to the character of the legislation enacted. This no longer is an open question in this State, and we do not deem it necessary to cite authority in support of the proposition.

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It is equally well settled that, if there is doubt as to the validity of the statute, it will be upheld; and if it be susceptible of two constructions, one of which would sustain it and the other destroy it, the courts will adopt that which will uphold the act, and we are disposed to give to legislation of the character here involved, where the right of the public in its use is not prohibited, but is permitted, a liberal construction, with a view to promote the public interest. In many portions of the State, where there are valuable mineral resources, it would seriously interfere with their development if the right to transport them to market was hindered or denied; and there can be little doubt that the public welfare will be advanced and promoted by furnishing every reasonable facility to owners of mines and quarries to put their products on the market. Every agency that helps to develop and build up the material resources of the State contributes to the good of all its people; and in many states influences of this character have induced the courts to adopt the view that whatever is or may be useful to the public is a public use, in the meaning of the Constitution. But the fact that the resources of mines and quarries are necessary for the public use will not in itself authorize the private owner in their development to take the land of the citizen for his individual use. While the courts will not shut their eyes to the necessity that exists for the development of the State, and will aid in every reasonable way the efforts of those who are trying to build it up, yet these considerations will not be permitted to destroy the ancient and valuable right that private property shall not be taken except for public use. The act in question goes to the very limit of legislative power and discretion. Under it is provided a means by which

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the owner of land, upon which may be found coal, oil, gas, timber, or mineral of any character, may take land to enable him to carry the product to any of the natural or artificial highways of transportation. The only limitation upon the right of the individual to the exclusive use, operation, and control of the way is found in the provision that any other person desiring so to do shall have the right to its use upon paying reasonable compensation. This is the only clause that saves the act from judicial condemnation. Giving to this provision the most liberal construction, it may be deemed to allow a use by the public of the way, although the person at whose instance it was taken opposes it; and hence it will be considered to have been taken for a public use, not upon the ground that the public will be benefited by the product gathered from the mine, well, or forest, but upon the ground that the public, or any number so desiring, may use the way.

For the reasons herein set forth, the judgment is affirmed.

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CASE 78.—SEPARATE PROCEEDINGS BY THE COMMONWEALTH, BY AUDITOR'S AGENT, AGAINST W. A. STEELE AND J. H. HICKMAN TO COMPEL THE LISTING OF OMITTED PROPERTY FOR TAXATION.—October 15.

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135 330

Commonwealth v. Steele

Appeal from Daviess Circuit Court.

T. F. BIRKHEAD, Circuit Judge.

From the judgment the Commonwealth Appeals.—Affirmed.

1. Taxation — Corporate Stock — Assessment. — Corporate stock subject to assessment for taxation should be listed at its market value, which includes the face and premium values.
2. Same.—Under Ky. Stats. 1903, section 4085, providing that property of corporations shall be assessed in the name of the corporation, and so long as it pays the taxes the stockholders shall not be required to list their shares, the commonwealth must first proceed against the corporation, and where it seeks to list corporate stock in the hands of stockholders it must show that it first proceeded against the corporation, or it will be presumed that the corporation listed its property as required by law.

ELI H. BROWN AND J. R. HAYS, attorneys for appellant.

A franchise paying corporation is forced under our law to pay tax on all its capital, whether invested in tangible property or not, at its earning capacity, and if a non-franchise paying corporation or its stockholders, is to escape taxation on every thing except its tangible property, and thus its stockholders escape taxation on the stock they own, this record discloses the bad business judgment of the investment of funds in a franchise paying corporation, because only a few franchise corporations have

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such values of stock as the records in this case show this stock has, and if the contention of appellee is sustained and their stock held exempt from taxation our statute thus provides for the exemption of a vast volume of producing wealth in this state, instead of requiring uniformity of taxation as required by our Constitution.

AUTHORITIES CITED.

Constitution of Ky., section 172; Henderson Bridge Co. c. Commonwealth, 99 Ky., 623; Ky. Stats., section 4085; Commonwealth v. C. & O. Ry. Co., 25 Ky. Law Rep., 1123; Marion Nat'l Bank v. Burton, 28 Ky. Law Rep., 864; Bank of Commerce v. State of Tenn., 161 U. S. (40 L. Ed., 649); Owensboro Nat'l Bank v. Owensboro, 173 U. S. (43 L. Ed., 851).

J. D. ATCHISON, attorney for appellees.

POINTS AND AUTHORITIES.

First.—The owners of shares of stock in corporations which are not required to pay a franchise tax, as well as the owners of stock in corporations which do pay a franchise tax, are not required, under the laws of the State of Kentucky, to assess their shares of stock for taxation.

Second.—In all cases where the shares of stock are exempt from taxation, then any premium that said stock may sell for in the market over and above its par value is also exempt from taxation. Ky. Stats., sections 4077 and 4078; Louisville Tobacco Warehouse Co. v. Commonwealth, 106 Ky., 165; Providence Banking Co. v. Webster County, etc., 108 Ky., 527; Aetna Life Insurance Co., etc., v. Coulter, Auditor, etc., 115 Ky., 799; Ky. Stats., section 4088; Commonwealth v. Thomas, 119 Ky., 215; Ky. Stats., section 4085; Muir's Committee v. Commonwealth, 14 Ky. Law Rep., 478; Louisville Savings Bank v. Commonwealth, 14 B. Monroe, 329; Ky. Stats., section 14, article 6, title "Revenue and Taxation;" Commonwealth v. First Nat'l Bank of Louisville, 4 Bush, 98; Act of Legislature of February 9, 1865 (Myer's Supplement to Revised Statutes, 482), section 1; 2 Revised Statutes, ch. 83, section 1, article 2, p. 239; 2 Revised Statutes, ch. 83, article 10, 266, section 1; Louisville & Evansville Mail Line Co. v. Barbour, Sheriff, etc., 88 Ky., 73; Whittaker, Auditor's Agent, v. Brooks, 90 Ky., 68; Board of Councilmen of City of Frankfort v. Fidelity Trust & Safety Vault Co., 23 Ky. Law Rep., 908; Calla-

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han, Sheriff, v. Singer M'f'g Co., 29 Ky. Law Rep., 123; L. & N. R. R. Co. v. Johnson, etc., 11 Ky. Law Rep., 118; Livingston, etc., v. City of Paducah, 80 Ky., 659.

OPINION OF THE COURT BY WM. ROGERS CLAY, COMMISSONER—Affirming.

These proceedings were instituted in the Daviess county court by the auditor's agent to compel the listing by appellees of certain omitted property. The same questions are involved in each case, and they will be considered together. The petition charges in each instance that the appellee therein referred to was the owner, on the 15th of September of the years 1899, 1900, 1901, 1902, 1903, and 1904, of money, certificates, bonds, mortgages, and stock in various corporations, none of which paid or was liable for a franchise tax, of the value of $125,000, and that none of said property was listed for taxation. After demurrers were overruled and certain preliminary motions were disposed of, answers were filed denying the allegations of the petitions. Upon the hearing, it developed that each of the appellees was the owner for the years mentioned of a large amount of stock in the Owensboro Wagon Company, a corporation organized under the laws of the state of Kentucky, and that this stock was worth more than par. The county court then adjudged that the premium alone on the stock holdings of each of appellees should be listed for the years 1900, 1901, 1902, 1903, and 1904. Upon appeal, the judgment of the county court was reversed by the Daviess circuit court; the latter court holding that neither the shares of stock nor the premiums thereon were subject to taxation, and that there had been no omission by either of the appellees in giving in their property for assessment for the

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years mentioned in the proceedings. From that judgment the Commonwealth has prosecuted this appeal.

We know of no rule of law by which the premium on stock may be listed for taxation unless the stock itself is subject to assessment. A share of stock cannot be separated into premium and par value for the purpose of taxation. If the stock is subject to assessment at all, it should be listed at its fair market value, which necessarily includes the face value of the stock as well as its premium value, if it be selling above par. The real question before us is to determine whether or not, under the law and circumstances of these proceedings, the stock in the hands of appellees during the years mentioned should be listed for taxation by them. The Owensboro Wagon Company, whose stock is owned by appellees, is not a franchise corporation, but what is known as a business or trading corporation. The law applicable to such corporations is found in section 4085, Ky. St. 1903, which is as follows: "The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that when legally called upon, the chief officer shall report a full statement of the property of such corporation for taxation, and for a failure, shall be subject to the penalties in this article provided; and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporations." It will be observed that the statute requires that the property of all corporations like the one in question shall be assessed in the name of the corporation in the same manner as that of a natural person. The primary liability is therefore placed

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upon the corporation. The stockholder becomes liable only in the event that the corporation fails to pay its taxes. Now, it cannot be contended that as a general rule it is within the power of the stockholder to compel the corporation to list its property. There may be instances, it is true, where the stockholder owns the majority of the stock, or, together with others, exercises a controlling voice in the management of the affairs of the corporation, but in by far the greater number of cases the individual stockholders, scattered here and there over the state, are utterly powerless to compel obedience from the corporation. On the other hand, the Commonwealth is provided with stringent laws and numerous agencies by which the corporation may be compelled to list its property. The responsibility therefore should be placed where the power lies. For these reasons, we think that a reasonable interpretation of the statute makes it incumbent upon the Commonwealth first to proceed against the corporation. If the corporation fails to pay its taxes, then, of course, the shareholders become liable. Any other rule would be unjust to the stockholder. The corporation might list its property for a number of years, and then arbitrarily refuse to do so. The stockholder who had not given in his stock for the particular year when the corporation stopped listing its property, because the corporation had been regularly complying with the law for the preceding years, and he had every reason to believe that it would continue to do so, would certainly be subjected to great hardship. He would have to pay all the penalties provided by the statutes, and thus suffer for the derelictions of others over whom he had no control. We therefore are of the opinion that in proceedings like these, where it is sought to list corporate stock

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in the hands of the stockholder, it should affirmativel appear from the record that the Commonwealth has first proceeded against the corporation. In the absence of such showing, the court will presume that the corporation did its duty by listing its property as required by law. As the record in these cases does not show that the Commonwealth first proceeded against the corporation, the action of the circuit court in reversing the judgment of the county court was proper.

Judgment affirmed.

CASE 79.—ACTION BY MARY H. McCLURE'S EX'R AGAINST C. L. AND H. A. KING ON LAND NOTES INVOLVING PRIORITIES OF LIENS, SUBROGATION AND ESTOPPEL.—October 15.

McClure's Exr. v. King, etc.

Appeal from Henderson Circuit Court.

J. W. HENSON, Circuit Judge.

From the judgment plantiff appeals. Reversed.

1. Subrogation—Payment of Debt—Rights of Surety.—Plaintiff's testatrix and her husband sold certain land by title bond, taking several notes in payment of the price, with F. as surety. On the day after the notes were executed, F. paid testatrix the amount of the first two notes, which were thereupon assigned to him without recourse, and F. thereafter sold the notes to defendants. Nothing more was ever paid on the remaining notes, and testatrix sued to recover the amount thereof, and to subject the land to the payment of the judgment. Held, under the rule, that subrogation cannot be invoked until full satisfaction of the original creditor's debt, defendants were not subrogated to testatrix's rights as to the notes so assigned for the purpose of having them declared a

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prior lien on the land to the testatrix's remaining notes unpaid.

2. Estoppel—Representations.—Under the rule that, in order to work an estoppel, the representations relied on must be plain and positive, and such as would mislead a person of ordinary prudence, testatrix was not estopped to claim a prior lien on certain land for the payment of purchase-money notes, because her husband, acting as her agent, stated to defendants that the first two notes which had been paid by a surety thereon and assigned to him, and were about to be transferred to defendants, "were all right."

THOS. E. WARD, attorney for appellant.

SUBJECT DISCUSSED.

1. Subrogation.

AUTHORITIES CITED.

Brant on Suretyship and Guaranty (3d Ed.), section 338; Am. & Eng. Encyc. of Law, vol. 27, p. 211; Willingham v. O. V. Banking & Trust Co., 22 Ky. Law Rep., 158; Columbia F. & T. Co. v. Kentucky Union Ry. Co., 60 Fed. Rep., 794; Shields on Subrogation, section 127; Hollingsworth v. Floyd, 2 Har. & G., 91; Insurance Co. v. Dorsey, 3 Md. Ch., 334.

2. The creditor's right in the lien must be entirely divested before the surety can be subrogated by operation of law. Magee v. Leggett, 48 Miss., 139; Bank v. Benedict, 15 Conn., 437; Cannet v. Blodget, 39 N. H., 152; Harlan v. Sweeney, 1 Lee, 682; Gilliam v. Esselman, 5 Sneed, 86; Kyner v. Kyner, 6 Watts, 221.

ROBERT D. VANCE, attorney for appellees.

PROPOSITIONS DISCUSSED.

Where appellee is induced by the appellant's representations or actions to purchase real estate notes under the belief that they are first liens upon real estate, the appellant is estopped from asserting that notes held by him are a prior lien upon said real estate.

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AUTHORITIES CITED.

Wimmer v. Ficklin, 14 Bush, 193; 16 Cyc., 755; Dodge v. Pope, 93 Ind., 480; 16 Cyc., 770; Crawford v. Colyer, 12 Ky. Law Rep., 990; Doss v. Kinchloe, 36 Ky. Law Rep., 452; 16 Cyc., 770; 4 R., 843.

OPINION OF THE COURT BY COMMISSIONER WM. ROGERS CLAY—Reversing.

On February 10, 1898, Mrs. Mary H. McClure and H. D. McClure sold to F. H. Martin, by title bond which was not recorded, a certain piece of real estate in Corydon, Ky., for the sum of $489. For the purchase price F. H. Martin, as principal, and A. L. Frisbie, as surety, executed to Mrs. Mary H. McClure the following notes, dated February 10, 1898, and bearing 8 per cent. interest from date: One for $60 payable on or before September 1, 1898; one for $100, payable on or before January 1, 1899; one for $109.66, payable on or before January 1, 1899; one for $109.66, payable on or before January 1, 1900; and one for $109.66, payable on or before January 1, 1901. On the day after the papers were executed, A. L. Frisbie, the surety, paid to Mrs. McClure the sum of $160, the amount of the first two notes. These notes were assigned to Mr. Frisbie, without recourse; the indorsement being signed by Mary H. McClure by H. D. McClure. Subsequently Frisbie sold and assigned the two notes in question to appellees, C. L. and H. A. King. Nothing more was ever paid on any of the notes by either Martin or Frisbie, so on August 28, 1903, Mrs. McClure, who has since died, brought suit on the three notes in her possession, asking a personal judgment against Martin and Frisbie and that the property be sold to satisfy her

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claim. On April 11, 1904, appellees, C. L. and H. A. King, filed their petition, which was made a cross-action, against Martin and Frisbie, in which they set forth the assignment of the two first notes to Frisbie, and their subsequent assignment to them under an agreement between all the parties to the contract that the first two notes should be a prior lien on the property, and prayed for judgment accordingly. To this petition and answer Mrs. McClure replied, setting up that Frisbie was the surety on the notes, and as such had paid them and taken an assignment thereof. She denied that Frisbie had any lien on the property superior or equal to plaintiff's lien, or that the Kings had any lien thereon except such as was subject to hers, and further denied that she or any one for her had ever made any agreement with the Kings or any one for them whereby their notes were to be paid first. Appellees thereupon filed their rejoinder, in which they alleged that prior to the purchase of the notes in question Frisbie and Martin represented to appellee H. A. King that the said notes were secured by first mortgage lien upon the real estate sold; that they further informed H. D. McClure, agent of plaintiff Mary H. McClure, of their desire to purchase said notes and of the representations made by Frisbie and Martin, and that said McClure said to appellees that the notes were all right, and to go ahead and trade for them; that in purchasing said notes they relied upon said representations. They then claimed that plaintiff by reason of said representations was estopped from asserting the suretyship of Frisbie, and from controverting the priority of appellees' lien. Upon the hearing the trial court entered a judgment placing all the notes upon an equality, and prorating the pro-

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ceeds derived from the sale of the property between the McClure estate and the Kings according to the amount of their notes. From that judgment this appeal is prosecuted.

We shall first examine the law applicable to cases of this character. In 1 Brandt on Suretyship & Guaranty (3d Ed.) p. 649, we find the following: "As a general rule, subrogation cannot be enforced until the whole debt is paid to the creditor. Part may be paid by the principal and part by the surety, and the surety then be entitled to subrogation, but the entire debt must be extinguished before subrogation can take place. It would not subserve the ends of justice to consider the assignment of an entire debt to a surety as effected by operation of law, where he had paid but a part of it, and still owed a balance to the creditor, and a court of chancery would not countenance such an anomaly as a pro tanto assignment, the effects of which would only be to give distinct interests in the same debt to both creditor and surety. Until the creditor is fully satisfied, there cannot usually be any interference with his rights or his securities which might even by bare possibility prejudice or embarrass him in any way in the collection of the residue of his claim." In 27 American & English Encyclopedia of Law (2d Ed.) p. 211, the rule is thus stated: "The creditor is entitled to full satisfaction of the debt before the right of subrogation may be invoked. The surety may not meddle with any of his rights and securities so long as any portion of the debt remains unsatisfied. As against the rights of the creditor, payment of a part of the debt by the surety will not subrogate him to a proportionate part of the securities applicable to the debt. Where a mortgage is given to secure sev-

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eral notes, the surety is not entitled to subrogation until all the notes are paid." In Columbia Finance & Trust Co. v. Kentucky Union Railway Company, 60 Fed. 794, 9 C. C. A. 264, the court in passing on this question said: "The rights of the creditor in the mortgaged property had not been extinguished by a payment of the whole debt. The payment of the whole debt for which the surety is liable is essential to subrogation. If the surety upon making a partial payment became entitled to subrogation pro tanto, and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the property was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall proportionately upon the creditor and upon the surety. Such a result would be grossly inequitable. Yet this is in effect the result of the contention urged. The equity of subrogation does not arise from the mere obligation to pay. It springs alone from payment. The liability of the surety for the remainder of the debt continued as well after as before such payment, and, until the entire debt is paid, the surety has no such equity as will entitle him to the active aid of a court of equity." The court further said: "The creditor's rights in the mortgage must be entirely divested before the surety can be substituted by operation of law, and allowed to stand in the shoes of a creditor." The foregoing doctrine was recognized and applied by this court in the case of Willingham v. Ohio Banking & Trust Company, 56 S. W. 706, 57 S. W. 467, 22 Ky. Law Rep. 158. This was a case where the principal debtor owed the trust

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company various debts, upon one of which amounting to the sum of $450 Willingham was surety. The principal debtor transferred to the company certain insurance policies as collateral security on his entire indebtedness. Willingham paid the debt for which he was surety. The trust company surrendered the two policies, and received thereon the sum of $750. Willingham sued for a pro rata distribution of said sum. The court held that no cause of action arose in his favor until all the debts held by the trust company were fully paid.

Applying these principles to the case at bar, it is manifest that the surety, Frisbie, would not be entitled to subrogation as against Mrs. McClure on the two notes paid by him. To hold otherwise would permit Frisbie to recover from Mrs. McClure money to which she was, justly entitled and for which he was legally bound, for the proceeds of the property were not sufficient to pay all the lien debts. That being the case, it follows that appellees who obtained the notes in question by assignment from Frisbie stand in his shoes, and have no rights other than those that Frisbie could assert, unless it appear from the record that appellees' plea of estoppel is available against appellant. An examination of the record shows that appellee H. A. King testified in part as follows: "Q. Now, if you had any conversation with A. L. Frisbie, F. H. Martin, or H. D. McClure before you bought the notes, about the purchase of these notes, give the conversation with each in detail. A. The conversation between A. L. Frisbie and myself was that he owned the notes, and that he said they were the first notes on the property. I saw Mr. McClure and he said they were regular and all right. Mr. Martin told me they were the first

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notes on the property, and he further stated that he expected to pay them off as they fell due. Q. At the time you spoke to H. D. McClure about your thinking of purchasing these notes, was anything said about the order in which these notes should be paid, and the notes then held by his mother, Mary H. McClure? A. I do not remember that there was. Q. To refresh your recollection, did he not tell you that it would be all right for you to purchase these notes, and that, if you purchased them, that they should be paid first, before the notes held by his mother? A. Yes; that was my understanding. Q. Now, just tell what he said about that. A. He said the notes were all right, and to go ahead and trade for them. That is about all I can state about it. Q. Did you tell Mr. McClure at the time that you were thinking of purchasing these notes? A. Yes, sir. Q. What did he say when you told him that? A. I think he said he had no objections; that it was all right." Mr. H. D. McClure, who is shown to be the agent of his mother, Mary H. McClure, testified as follows: "Q. Tell what, if any, arrangement was made between Mrs. McClure or you for her with him, as to how the said notes owing by Martin for the land were to be paid. I mean the notes held by you and the notes held by King. A. There was no arrangement made whatever. She expected to get the purchase money. Q. State whether or not there was any agreement made by her, or you for her, whereby the notes held by King were to be paid first. A. None whatever, except this: If Martin were to pay the King notes then and there, it would be all right with her, but no future payment would be. Q. Was any understanding or agreement had whereby King was to have a priority of lien on the land over the

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notes held by Mrs. McClure? A. None whatever." It appears from the foregoing evidence that appellees relied more upon the statements made by Frisbie and Martin that the notes in question were the first notes on the property than they did upon the statements made by H. D. McClure. But it will not be contended that their statements could in any way bind Mrs. McClure, for they bore no such relation to Mrs. McClure as would authorize them to contract for her or say things that could be pleaded against her by way of estoppel. That being the case, the plea of estoppel must be supported alone by such agreeents or statements as were made by H. D. McClure on behalf of his mother. It nowhere appears in the record of the evidence that Frisbie's and Martin's statements that the notes purchased by appellees were the first notes on the property were ever repeated to H. D. McClure, and that he made his statements after knowing of the representations made by them. It only appears that he knew appellees were thinking of purchasing the notes, and what he said must be weighed and considered in the light of that knowledge alone. Appellee, when asked the direct question if anything was said about the order in which the notes should be paid, replied that he did not remember that there was. It was only when his recollection was refreshed by a very suggestive question of counsel that he claimed that it was his understanding that the notes he had purchased were to be paid first. When asked to tell exactly what was said about that by H. D. McClure, his reply, was: "He said that the notes were all right, and to go ahead and trade for them." At another time, when asked what Mr. H. D. McClure said, his answer was: "I think he said that he had no objections; that it

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was all right." At still another time, his reply to the question, "Did you ask him (McClure) about the order in which the notes would be paid, if you should purchase them?" was, "I don't think that I did." Thus it will be seen that appellee H. A. King corroborates the testimony of H. D. McClure, who testified that there was no understanding nor agreement whereby King was to have a priority of lien over the notes held by his mother. As the question of the priority of the notes was not mentioned in the conversation between King and McClure, we must determine whether or not Mrs. McClure is estopped to assert the priority of her lien by the mere statement of her agent that the notes were all right. The rule is that, in order to work estoppel, the representations relied upon should be plain and positive, and such as would mislead a person of ordinary prudence. It is not sufficient that a party was misled by drawing an inference that was not warranted by the words used. The expressions used by H. D. McClure cannot be interpreted as carrying with them any waiver of the rights of his mother. If appellees were misled thereby, it was only because they attributed to his words a meaning which the words themselves did not reasonably import. Under the circumstances, therefore, Mrs. McClure's executor is not precluded from asserting the priority of his mother's lien.

Judgment reversed, with directions to the trial court to apply the proceeds of the sale of the property first to the payment of appellant's lien.

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CASE 80.—ACTION BY THE ADMINISTRATOR OF ARRETUS HOWARD AGAINST W. H. HUNTER FOR DAMAGES FOR CAUSING THE DEATH OF PLAINTIFF'S INTESTATE.—October 15.

Howard's Admr. v. Hunter

Appeal from Daviess Circuit Court.

T. F. BIRKHEAD, Circuit Judge.

Judgment for defendant, plaintiff appeals. Reversed.

Death—Action—Parties.—Const., section 241, provides that whenever death results from negligence or wrongful act damages may be recovered; the action, till otherwise provided by law, to be prosecuted by decedent's personal representative, and till otherwise provided the recovery shall form a part of the personal estate. Ky. Stats. 1903, section 6, provides that when death results from negligent or wrongful act damages may be recovered, and the action shall be prosecuted by the personal representative. Section 4 provides that the widow and minor children of one killed by the careless, wanton, or malicious use of firearms or other deadly weapons may have an action therefor. Held, that the administrator of one whose death was caused by the wrongful use of firearms had a right of action therefor; deceased not being survived by widow or child, and the words "wrongful act" as used in the Constitution and statute embracing every injury that might be committed against the person, whether negligently done or not.

ELI H. BROWN and J. R. HAYS for appellant.

We respectfully submit that it would not do to read into section 241 of the Constitution that the action given therein is not allowed to the personal representative of an unmarried man, or to one whose life was wrongfully taken by a pistol or gun shot instead of a fence rail of a rock. No such discrimination

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is attempted by the plain language of this section, and we think none will be attempted by the court.

AUTHORITIES CITED.

Constitution of Kentucky, Section 241; Passamaneck's Admr. vs. Louisville Ry. Co., 99 Ky. 409; Henderson's Admr. vs. Central &c., Ry. Co., 86 Ky. 389; Jordan's Admr. vs. Cincinnati, &c., Ry. Co., 89 Ky. 40; Wright vs. Woods' Admr., 96 Ky. 56; Thomas' Admr. vs. Royster, 98 Ky. 206; McClure vs. Alexander, 15 Ky. Law Rep. 732; East Tennessee Telephone Co. vs. Sims, 99 Ky. 409.

LA VEGA CLEMENTS and FOREST A. ROBY, attorneys for appellee.

POINTS AND AUTHORITIES.

1. There are only two statutes in Kentucky for which damages can be recovered for injury resulting in death. (Section 6, chapter 1, Kentucky Statutes; section 4, chapter 1, Kentucky Statutes.)

2. The terms used in the petition are inconsistent, and contradictory of each other. (Webster's Dictionary defining word, "wilful;" Anderson vs. Territory, 13 Pacific Rep. 21; United States vs. Boyd, 45 Fed. Rep 851.)

3. No action could be maintained at common law for damages for an injury resulting in death, but such right is exclusively a statutory remedy. (Eden vs. Lexington & Frankfort R. R. Co., 14 B. M. 165; O'Donognue v. Akin, 2 Duvall 478; Harris v. Ky. Timber & Lumber Co., 19 Ky. Law Rep. 1731; Gregory vs. I. C. R. R. Co., 26 Ky. Law Rep. 76.)

4. The personal representative cannot maintain this action but only widow or child of decedent. (Donahue vs. Drexler, 82 Ky. 157; McClure, &c., vs. Alexander, 15 Ky. Law Rep. 732.)

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Arretus Howard was shot and killed by appellee, Hunter. He did not leave surviving him a widow, child, or children. This action was instituted by his personal representative to recover damages for his

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death, which was alleged to have been negligently and wrongfully caused by the act of appellee. The court sustained a general demurrer to the petition. Whether this ruling was correct or not, is the only question presented by this appeal.

Section 241 of the Constitution provides that: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case damages may be recovered for such death from the corporation and person so causing the same; until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form a part of the personal estate of the deceased person." To make more effective the purpose of this section, the Legislature enacted section 6 of the Kentucky Statutes of 1903, reading: "Whenever the death of a person shall result from an injury inflicted by a negligent or wrongful act, then in every such case damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same; and when the act is willful or negligence gross, punitive damages may be recovered; and the action to recover such damages shall be prosecuted by the personal representative of the deceased." The remainder of the section relates to the distribution of the amount recovered. This section is found in an act approved July 3, 1893 (Laws 1893, p. 1383, c. 252), and section 4 of the act provides that: "The widow and minor child, or either or both of them of a person killed by the careless,

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wanton, or malicious use of firearms, or by any weapon popularly known as colt's, brass knuckles, slung-shots, or other deadly weapon, or sand bag, or any imitation or a substitute therefor, not in self-defense, may have an action against the person who committed the killing, and all others aiding or promoting, or any one or more of them; and in such action the jury may give vindictive damages."

The lower court sustained a demurrer to the petition upon the ground that under section 4, supra, the right of action to recover damages for the death of a person killed by the careless, wanton, or malicious use of firearms is vested exclusively in the widow and minor child of the deceased; and if the deceased does not leave surviving him a widow or minor child or children the right of action dies with him, and does not survive to his personal representative. This ruling was largely, if not altogether, influenced by the opinion of this court in McClure v. Alexander, 24 S. W. 619, 15 Ky. Law Rep. 732. In that case Alexander shot and killed McClure. The widow and an infant daughter of the deceased instituted an action against Alexander to recover damages for the death of McClure. The trial court dismissed the petition for the alleged reason that the cause of action was alone in the personal representative of the deceased by virtue of section 241 of the Constitution. In reversing the case, it was held not to be the intention of the Legislature in the enactment of section 6, supra, to repeal section 4, and in the course of the opinion the court said that when the deceased left a widow or minor child the right of action was in them. The precise question here presented was not involved in that case. If that opinion may be so construed as to deny the right of

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a personal representative to maintain the action, when the deceased does not leave a widow or minor child, it is in conflict with the views now entertained by the court, and will not be followed. The proper construction of the statute is that, if the deceased leaves a widow and minor child or children then the action may be prosecuted by them; if he is not survived by either, then his personal representative may sustain it. It was the manifest intention of the constitutional provision quoted to allow an action to be maintained whenever the death of a person was caused by the negligent or wrongful act of another and it is not within the power of the Legislature to deny this right of action. The section is as comprehensive as language can make it. The words "negligence" and "wrongful act" are sufficiently broad to embrace every degree of tort that can be committed against the person. In Shearman & Redfield on Negligence, section 3, "negligence" is thus defined: "Negligence, constituting a cause of civil action, is such an omission by a responsible person to use that degree of care, diligence and skill which it was his legal duty to use for the protection of another person from injury, as in a natural and continuous sequence causes unintended damage to the latter." The word "negligence" implies a breach of duty, and a person cannot be legally negligent so as to subject him to damages except in respect to others to whom he owes a duty. Hence, as the word "negligence" has a limited meaning, the words "wrongful act" were used to embrace every injury that might be committed against the person, whether negligently done or not. A wrongful act may or may not be negligent, depending on how it is committed and the relation between the parties. Many wrongful acts are com-

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mitted in which there is no element of negligence—no breach of duty is committed. A wrongful act may be criminal, willful, wanton, or reckless. In short, every injury inflicted upon the person without legal right or excuse is a wrongful act without reference to the relation existing between the perpetrator and his victim. Clearly the death of a person caused by the careless, wanton, or malicious use of firearms is a wrongful act as much so as if the death was due to a blow from an iron poker, or an ax or any other instrument. It would be a most anomalous state of affairs to hold that the personal representative might maintain an action for damages resulting from the death of his intestate caused by any careless, wanton, or malicious act, except when the weapon used to inflict the death was a firearm or other deadly weapon. The effect of this construction would be that if the death was caused by smothering, drowning, burning, or poisoning, the cause of action would survive to the personal representative; but if it was caused by the use of firearms, or other deadly weapons, it would die with him, unless he left a widow or minor children. Any act that is wanton or malicious is necessarily wrongful, and whenever death is caused by a wrongful act, however it may be committed, or whatever the means or instrument used in its commission may be, a cause of action survives to the personal representative. Any other interpretation would seriously impair, if not destroy, the meaning of the words "wrongful act" found in the Constitution and inserted for the purpose of allowing a cause of action for the death of any person caused by such act. If the deceased, who is killed by the use of any of the weapons mentioned in section 4 of the statute, leaves a widow and minor child, or either, then the action

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may be maintained by them under section 4; but, if he leaves neither, then his personal representative may sue under section 6 of the statute. If the action is brought under section 4 by the widow and minor child, the pleading must follow the terms prescribed in the section. There is no conflict between the sections. Both may be upheld. Section 6 merely enlarges the remedy and gives a right of action not authorized by section 4. And so, if the widow or minor children will not prosecute the action under section 4, then the personal representative may do so under section 6, and, if the personal representative fails or refuses, the widow or minor child may sue. McLemore v. Sebree Coal & Mining Co., 121 Ky. 53, 88 S. W. 1062, 28 Ky. Law Rep. 25. But if the deceased leaves a widow or minor child, the right of action is primarily in them. This construction gives full force and effect to both the Constitution and the statute, while the one contended for by appellee would take away from the constitutional provision, and the statute enacted in pursuance thereof, a large part of their meaning.

We have not deemed it necessary to consider the state of the law prior to the adoption of the present Constitution. Previous to that time, when death resulted from negligence or wrongful act, there was considerable confusion and uncertainty, not only as to whom the cause of action to recover damages was in, but when it might be maintained, if at all. In O'Donoghue v. Akin, 2 Duv. 478; Eden v. Lex. & Frankfort R., 14 B. Mon. 165; Harris v. Ky. Timber & L. Co., 43 S. W. 462, 45 S. W. 94, 19 Ky. Law Rep. 1731; Gregory v. I. C. R. Co., 80 S. W. 795, 26 Ky. Law Rep. 76; Spring v. Glenn, 12 Bush 172; Morgan v. Thompson, 82 Ky. 383, 6 Ky. Law Rep. 499;

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Jordan v. C., N. O. & T. P. R. Co., 89 Ky. 40, 11 S. W. 1013, 11 Ky. Law Rep. 204, will be found opinions illustrative of this subject. To remedy this confusion and uncertainty, and remove all doubt touching the right of recovery, section 241 of the Constitution was enacted.

Wherefore the judgment of the lower court is reversed, with directions for a new trial in conformity with this opinion.

CASE 81.—ACTION BY CHARLES T. WARREN'S ADMR. AGAINST NANNIE WARREN AND OTHERS TO SETTLE THE DECEDENT'S ESTATE.—October 15.

Warren's Admr. v. Warren, &c.

Appeal from Hardin Circuit Court.

WEED S. CHELF, Circuit Judge.

From the judgment plaintiff appeals. Reversed.

Homestead—Right of Widow and Children.—Under Ky. Stats. 1903, section 1707, providing that a homestead shall be for the use of the widow, so long as she occupies it, and of the unmarried children of the deceased husband till the youngest is of age, but said land may be sold, subject to the right of the widow and children, if necessary to pay decedent's debts, the widow and children are entitled to such homestead as deceased, if living, could have claimed under sections 1702, 1703, 1705, so that, the homestead right being an indivisible property of greater value than $1,000, the whole property may be sold for decedent's debts, and $1,000 of the proceeds be set aside for the use of the widow and children for such time as they would be entitled to use of a homestead.

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S. H. BUSH and D. M. COOPER for appellants.

It was not the intention of the Legislature in enacting section 1707 to give the widow and infant children a greater interest in the homestead than the deceased husband and father had, but merely to give them a homestead undisturbed by creditors of deceased.

In the case at bar, injustice is done to the creditors of deceased in giving the widow and children the use of a house and lot worth $3,000 or more until the youngest child, now five years of age, shall attain her majority. This being the chief resource of the estate there would be very little, if anything, left to pay the creditors amounting to over $6,000.

AUTHORITIES CITED.

Ky. Statutes, section 1702, 1705, 1707; Sanberry v. Sims, 79 Ky. 527; Schnabel, &c., v. Schnabel, &c., 108 Ky. 536; Higgins, &c., v. Higgins, 78 S. W. 1123; Hanna's Assignees v. Gay, &c., 78 S. W. 915; Meyers Gdn. v. Meyers Admr., 89 Ky 442; Clay's Gdn. v. Wallace, 76 S. W. 388.

JAMES C. POSTON, attorney for appellees.

POINTS AND AUTHORITIES.

1. Even if case is reversed no costs should be had against appellees. (Ky. Stats., section 891.)

2. The Homestead Law. (Ky. Stats., section 1705-1707.)

3. Value of homestead not always restricted to $1,000. (Turner's Gdn. v. Turner's heirs, 89 Ky. 583.)

4. Where the husband owned the homestead and dies, the homestead being worth more than $1,000 and indivisible, the land may be sold for the debts of the husband, but can only be sold subject to the right of the widow and infant children. (Loyd v. Loyd, 82 Ky. 524; Sansberry vs. Simms' Admrx., 79 Ky. 531.)

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Charles T. Warren died, leaving surviving him a widow and infant children. At the time of his death, he owned a house and lot occupied as a homestead,

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and worth about $3,500. It was not susceptible of division. This action was brought by his administrator to settle the estate of Warren, which was insolvent; and he asked that the house and lot be sold, and, after setting apart $1,000 as a homestead right to the widow and children, the remainder of the proceeds be applied to the payment of the debts due by the estate. The widow and children insisted that, under the statute, they had a right to occupy the homestead, and that it could only be sold subject to their right of occupancy. The court adopted this view, and adjudged "the defendant Nannie Warren, widow of Charles T. Warren, deceased, and their unmarried infant children, are entitled to the use and joint occupany of said property as a homestead during the life of said widow and until the youngest unmarried child of said Nannie and Charles T. Warren arrive at the age of 21 years, and that said property is indivisible, and the master commissioner is hereby ordered and directed to make the sale of the same subject to the above-mentioned rights of the widow and infant children." From this judgment, the administrator and creditors prosecute this appeal.

Section 1702 of the Kentucky Statutes of 1903 provides, in part, that "there shall be exempt from sale under execution, attachment or judgment, except to foreclose a mortgage given by the owner of the homestead or for purchase money due therefor, so much land including the dwelling house and appurtenances owned by debtors, who are actual bona fide housekeepers with a family resident in this Commonwealth, as shall not exceed in value one thousand dollars." Section 1703: "Before a sale under execution, attachment or judgment of land occupied as a homestead, the officer in whose hands the writ or judgment may

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be shall cause such part thereof which may be selected by the defendant as shall not exceed in value one thousand dollars to be valued under oath and set apart to him by two disinterested housekeepers of the county." Section 1705: "Where the defendant in the execution, attachment or action owns real estate which is levied on, or sought to be subjected to the payment of any debt or liability, and the same in the opinion of the appraisers is of greater value than one thousand dollars, and indivisible without great diminution of its value, then the same shall be sold under execution, attachment or judgment and one thousand dollars of the money arising from the sale shall be paid to the defendant to enable him to purchase another homestead." Section 1707: "A homestead shall be for the use of the widow so long as she occupies the same; and the unmarried children of the husband shall be entitled to a joint occupancy with her until the youngest unmarried child arrives at full age; but the termination of the widow's occupancy shall not affect the right of the children, but said land may be sold subject to the right of said widow and children if a sale is necessary to pay the debts of the husband."

The first inquiry that naturally suggests itself is: What right or interest did the widow and children take under section 1707? Manifestly all they are entitled to is the homestead that the husband could claim if living. If the husband had a homestead, upon his death his widow and unmarried infant children are allowed the use of it. They are not entitled to the use of $3,000 or $5,000 worth of property as a homestead, or any property exceeding in value $1,000. When $1,000 has been set apart to them for use and occupancy, they have received the full home-

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stead right contemplated by the statute. In every section of the statute speaking of it, the homestead is limited to $1,000. Nowhere do we find any intimation that either the husband or widow or children are entitled to claim as a homestead property of greater value. It would be giving the statute a most unreasonable construction to hold that, although the husband could only claim property of the value of $1,000 for a homestead, that immediately upon his death his widow might be entitled to hold property of the value of $10,000 as a homestead. If the position maintained by counsel for appellee is correct, there is no limit upon the value of indivisible property that the wdow may hold as a homestead. If the husband at the time of his death occupied as a homestead a house worth $10,000, his widow and children, according to his argument, could hold the whole of it against his creditors as long as the widow occupied the same, or until the youngest unmarried child arrived at full age, notwithstanding the fact that the estate was insolvent and the property in excess of $1,000 necessary to pay the debts. As the widow and unmarried infant children only take the homestead the husband was entitled to, it comes to them in respect to its value subject to the conditions that attached to it before the death of the owner. If, during his life, he has a homestead right in indivisible property of the value of more than $1,000, the whole of the property is subject to sale under execution, attachment, or judgment, and out of the proceeds there must be paid to him $1,000. If he dies the owner of a homestead in this indivisible property that is worth more than $1,000, then the whole of the property may be sold under execution, attachment, or judgment, and $1,000 of the proceeds must

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be set apart for the use of the widow and the unmarried infant children. This $1,000 may be invested by order of court, or it may be loaned. In either event, the widow and children have the right in the property or its proceeds given by section 1707 and the creditors of the husband if the $1,000 is invested in property may sell the same subject to the right of the widow and children. If not invested, the $1,000 must be so protected by the court as that the creditors of the husband may secure the same after the right of the widow and children in the income derived therefrom has been extinguished. The suggestion in Sansberry v. Simms, 79 Ky. 527, 3 Ky. Law Rep. 303, apparently in conflict with the views herein expressed, must be considered as dictum, not necessary to a decision of the question before the court.

Wherefore the judgment of the lower court is reversed, with directions to enter a judgment in conformity with this opinion.

EXTENDED OPINION BY JUDGE BARKER, November 20, 1907.

The question of the widow's right to elect between homestead and dower is not presented in this record. The fact that she made a mistake as to her right to occupy her husband's domicile as a homestead, although it was worth more than one thousand dollars, does not militate against her right to elect to take dower in lieu of homestead after her right of homestead is properly defined and limited. When the case returns to the circuit court she may elect between homestead and dower. If she elects to take dower she will be required to furnish a homestead for the

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infant children to the extent of one thousand dollars out of it. (Section 1726, Ky. Statutes.)

CASE 82.—PROSECUTION AGAINST TOM NUNAN FOR UNLAWFULLY SELLING DOMESTIC BEER WITHOUT A LICENSE.—October 15.

Commonwealth v. Nunan

Appeal from Clark Circuit Court.

J. M. BENTON, Circuit Judge.

From a judgment dismissing the information the Commonwealth appeals. Reversed.

1. Statutes—Rules of Construction—Purpose of Act.—If a reason can be discovered for a particular construction of a statute, especially of a revenue statute, which construction would deprive the treasury of revenue, such construction will be discarded in favor of one that will apply uniformly to all persons engaged in the same calling, and so as to raise revenue.
2. Intoxicating Liquors—Licenses—Statutory Provisions—Construction of Act.—Acts 1906, p. 193, chapter 22, subdivision 4, requiring licenses from wholesale liquor dealers, provides that "For each agency in this state established by resident brewers or resident wholesale dealers in domestic beers or malt liquors, * * * a license fee shall be paid." Held, that the fee is required to be paid not only for each agency in the state established by resident brewers, but must also be paid by each resident wholesale dealer in domestic beers or malt liquors.
3. Same.—Acts 1906, p. 193, chapter 22, subdivision 4, taxing certain occupations, does not include in the general provision enumerating the taxable occupations that of resident wholesale dealer in domestic beers or malt liquors, but it is included in the specific description in a later section. Held,

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that the general description yields to the specific one, and the latter section extends the former so as to include such occupation.

N. B. HAYS, Attorney General, C. H. MORRIS and B. A. CRUTCHER, for appellant.

F. H. HAGGARD and J. SMITH HAYS for appellee.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

The information filed by the commonwealth attorney in the circuit court charges the defendant with the unlawful sale of beer by wholesale without a license, specifying that he unlawfully and willfully sold by wholesale, in quantities of more than five gallons, domestic beer to John Nunan without a license so to do. A demurrer was sustained to the information, and it was dismissed. The Commonwealth appeals.

By the revenue act of 1906, being chapter 22, p. 188, Acts 1906, it is provided by subdivision 4: "Before engaging in any occupation or selling any article named in this subdivision, the person desiring so to do shall procure license and pay the taxes thereon." A very considerable number of occupations is included, among them that of wholesale liquor dealers. That section reads: "That all corporations, associations, companies, co-partnerships, or individuals, citizens (except distillers sellng straight whiskies or brandies of their own make) of, or residing in this State engaged in the business or occupaton of compounding, rectifying or blending distilled spirits, or selling by wholesale in the usual course of trade distilled spirits, or selling by wholesale compounded, rectified or blended spirits known and desig-

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nated as single stamp spirits, shall annually pay to the State a license therefor. That all foreign corporations, associations, companies, co-partnerships, or individuals engaged in the business or occupation of selling by wholesale in this State in the usual course of trade distilled spirits, or rectified, blended or compounded spirits known and designated as single stamp spirits, shall annually pay to the State a license tax therefor. That all corporations, companies, associations, co-partnerships, or individuals, citizens of, or residing in this State engaged in the business or occupation of owning or operating breweries, shall annually pay a license tax to the State therefor. That all corporations, companies, associations, co-partnerships or individuals engaged in the business of a broker or commission merchant selling straight whiskey and who do not handle the same shall annually pay a license therefor to the State. That all foreign corporations, associations, companies, co-partnerships or individuals engaged in the business of selling by wholesale in this State, in the usual course of trade, beers or malted liquors shall annually pay a license tax to the State therefor as hereinafter specifically provided for. That all corporations, associations, companies, co-partnerships, or individuals, citizens of, or residing in this State and engaged in the business of selling by wholesale, in the usual course of trade, wines, ales, mineral waters or any vinous liquors, shall annually pay to the State a license tax therefor. That all foreign corporations, associations, companies, co-partnerships or individuals, engaged in the business of selling in this State by wholesale or to jobbers in the usual course of trade, wines, ales, mineral waters, or vinous liquors, shall annually pay a license

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tax to the State therefor. The license taxes imposed shall be as follows:" $100 is imposed upon each resident wholesale dealer of rectified spirits who sells 500 barrels or less in a year; $200 is imposed upon such dealer who sells between 500 and 1,000 barrels in a year; $300 is imposed upon such dealer who sells more than 1,000 barrels. The same rates are imposed upon foreign wholesale dealers. The section continues: "For each brewery in this State, two hundred dollars. For each agency in this State established by resident brewers or resident wholesale dealers in domestic beer or malted liquors, twenty-five dollars. For each foreign brewer doing business in this State, two hundred dollars. For each agency established and operated in this State by a foreign brewer or foreign wholesale dealer or jobber of any foreign beers or malted liquors, twenty-five dollars. For each resident wholesale dealer of wines, ales, or any vinous liquors, two hundred dollars; provided, that in the event a resident wholesale dealer of wines, ales or any vinous liquors, is also a wholesale dealer of rectified, blended or compounded single stamp spirits or of straight distilled spirits, but one license tax shall be paid, and which shall not be less than three hundred and fifty dollars. For each foreign wholesale dealer or jobber of wines, ales, mineral waters or vinous liquors, two hundred dollars. For each broker or commission merchant selling straight whiskey, and who do not handle the same, one hundred dollars."

The reading of these sections discloses that no license is required to be taken out by a wholesale dealer in domestic beer, unless it is in this paragraph: "For each agency in this State established by resident brewers or resident wholesale dealers in do-

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mestic beers or malt liquors, twenty-five dollars." When the Legislature has been at so much pains to elaborate a comprehensive system of license taxation imposed upon many necessary and probably all unnecessary business vocations, especially upon all dealers in all kinds of liquors, even down to mineral waters, it is not probable that they contemplated that one class of liquor dealers should escape the payment of such tax. The only class who does escape, if any does, is the wholesale dealer in domestic beer. There is no reason apparent, viewed either from the standpoint of police regulation or revenue raising, why a wholesale dealer in domestic beer should be exonerated. If the license is exacted as a police measure, he is apt to do as much mischief in his vocation as a foreign dealer, or a dealer in foreign-made beer. If it is viewed from the revenue standpoint, it would defeat the purpose of the Legislature in a large measure by exempting such one, because in that event it would be useless for either foreign or domestic brewers to establish agencies in this State, and pay the revenue taxes thereupon, when they could sell their beers to wholesale dealers who would not have to pay taxes. Manifestly the wholesale dealer would have a decided advantage over the brewer in the matter. If a reason can be discovered for a particular construction of a statute, and especially of a revenue statute, which construction would deprive the treasury of revenue, such construction will be discarded in favor of one that will apply uniformly to all persons engaged in the same calling or business and so as to raise revenue. Reading the last-quoted paragraph in the light of the foregoing declaration, we construe that the tax is required to be paid for each agency in this State by resident

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brewers, and is also required to be paid by each resident wholesale dealer in domestic beers or malted liquors. Such is not only the grammatical construction of the sentence quoted, but is more in harmony with the evident purpose of the Legislature in its enactment. The same language as that quoted appears in regulating the tax imposed upon foreign agencies and dealers. The agency referred to applies to the means of distribution adopted by the brewer. The wholesale dealer may sell either domestic or foreign beer without being an agency established for the purpose by the brewer. Nor could it well be said that the agent is a wholesale dealer. The two are mentioned in the disjunctive in the section, indicating that the Legislature had both in mind and intended to tax each. The general provision, it is true, omits resident wholesale dealers from the classes indicated in the section first quoted. But the rule of construction is that general descriptions yield to specific ones. The latter section construed extends the former so as to include wholesale dealers of all kinds of liquors.

In our opinion the information stated a public offense against appellee, and the demurrer should have been overruled.

The judgment is reversed, and cause remanded for proceedings consistent herewith.

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CASE 83.—ACTION BY THOMAS S. WREN'S EXR. AGAINST JAMES W. WREN'S EXRS. AND OTHERS.—October 15.

Wren's Exr. v. Wren's Extx.

Appeal from Kenton Circuit Court.

Judgment for defendants, plaintiff appeals. Affirmed.

1. Limitation of Actions—Executors—Final Account—Surcharge. —Where an executrix's final account was settled December 31, 1895, a proceeding to surcharge it for misappropriation of funds by the executrix, not instituted until August 25, 1906, was barred by Stat. 1903, section 2519, providing that no action for relief for fraud or mistake shall be brought after 10 years from the perpetration of the fraud, etc.
2. Executors—Accounting—Right to Surcharge.—Where an ancestor bequeathed his entire estate to his wife, who was also his executrix, for life, the right of the executor of a remainderman to surcharge the settlement of the executrix for fraudulent misappropriation of the capital of the estate was entirely distinct from and independent of his right to proceed against the widow as life tenant.
3. Limitation of Actions—Suspension—Statutes.—An action to surcharge the settlement of an executrix's account for fraud is not within Stat. 1903, section 2543, declaring that the provisions of the chapter shall not apply to a continuing and subsisting trust, etc., which includes only such continuing trusts as entitled the trustee to hold the estate independent of the cestuf que trust.
4. Same—Equitable Rights—Application.—Under Stats. 1903, section 2522, providing that an action for relief not otherwise provided for can only be commenced within 10 years next after the cause of action accrued, the statutes of limitation apply to all actions, whether based on equitable or legal rights.

FRANK M. TRACY for appellant.

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S. D. ROUSE for appellee.

(No breifs—Record misplaced.)

OPINION OF THE COURT BY JUDGE BARKER—Affirming.

James W. Wren died, testate, in the year 1890, at his domicile in Kenton county, Ky., leaving a widow, Virgina S. Wren, but wthout bodily heirs. By the terms of his will the testator devised his whole estate to his wife for life, and she was named as executrix of it. Afterwards, the will was duly probated, and the appellee qualified as executrix. The appellee made a partial settlement of her accounts as executrix in the county court of Kenton county on the 12th day of January, 1893. She afterwards made a final settlement on the 31st day of December, 1895, and the balance remaining in her hands as executrix after the payment of the debts of the decedent she held as tenant for life under the will of her husband. When James W. Wren died, his father, Thomas S. Wren, was alive and resided in Montgomery county, Ky. Afterwards he died, leaving a will, of which the appellant, Lewis Apperson, was appointed and qualified as executor. On the 25th day of August, 1906, the appellant Apperson, as executor aforesaid, instituted this action in the Kenton circuit court for the purpose of surcharging the settlements of the appellee as executrix of her husband, in order to increase the amount of the estate of which his testator was remainderman. We cannot better state the claim of appellant than by borrowing the following lucid statement from his brief: "This controversy affects only the personal estate, which was inventoried at about $16,000. On the 12th day of January, 1893,

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Virginia Wren, as executrix of James W. Wren, made a first settlement with the Kenton county court and thereafter on the 31st of December, 1895, made a second settlement which was designated a final settlement of her accounts. Appellant is the executor of Thomas S. Wren, and brought this action for the purpose of protecting and safeguarding the remainder interest of his testator; he alleging that Virginia Wren had misappropriated more than $6,500 of the personal estate, that she had illegally consumed that much of the corpus of the estate, and had fraudulently claimed credit for said sum of money in her two settlements, which said settlements he asked to have surcharged and falsified, and the amount thus shown to have been misappropriated restored to the estate, that judgment for the amount found due be rendered against Virginia Wren, and that a trustee be appointed to take charge of the estate." To the cause of action set up in this petition the appellee, among other things, pleaded, the 10 years' statute of limitations as a bar to the action to surcharge her settlements as executrix. A demurrer to this answer was overruled by the court, and, the appellant declining to plead further, his petition was dismissed.

The sole question involved on this appeal is the sufficiency of the plea of the 10 years' statute of limitation as a bar to appellant's right to surcharge the settlements of appellee as executrix of her husband's estate. It must be observed that there is no claim in the petition that appellee, as life tenant, has wrongfully converted or diminished in any way the estate which came into her hands as such. The sole claim is that, as executrix, she made false and fraudulent settlements, paid her individual debts with her

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husband's estate, paid claims without lawful vouchers, and in this way reduced the body of the estate which was to come into her hands as life tenant to, at least, $6,500 less than it should have been. It is clear, then, as before said, that the one question in this case is whether or not the right to surcharge the settlement of a fiduciary with a county court is barred by the 10 years' statute of limitation. Section 2519, Ky. Stats. 1903.

The very principle we have here arose in the case of Blake v. Wolfe, 105 Ky. 380, 20 Ky. Law Rep. 1212, 49 S. W. 19, 50 S. W. 2. That was an action by wards against their guardian, and, in order to recover, it was necessary that they should surcharge his settlements made as guardian, and the question arose whether the 10 years' statute of limitation barred the surcharging of the guardian's settlements, and on this phase of the case the court said: "But it appears from the record that the guardian made a settlement of his accounts on May 13, 1872, from which it was shown that he had but little, if anything, in his hands. Appellees seek to surcharge this settlement in this action, filed more than 20 years after it was made, and more than 13 years after the youngest son was of age. The settlement, unless surcharged, is a protection to appellant. It remains therefore to inquire whether this petition was filed in time for that purpose. The statute provides: 'In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud.' If the guardian made a mistake in his settlement, and credited himself hon-

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estly with credits to which he was not entitled, the action to correct the settlement is certainly an action for relief for mistake, within the meaning of this section; and if he did not act honestly, but fraudulently charged himself with less than he had received, or fraudulently credited himself with money he had not expended, as alleged by appellees, the case falls equally within the statute; and, by its plain terms, the action must be brought, in any event, within 10 years after the ward arrived at age." And in the response to the petition for a rehearing it was said: "The object of having settlements made by fiduciaries in the county court is to make a statement of their accounts of record, and these settlements are an idle form, if the judgments of the county court confirming them may be wholly disregarded. So it has been uniformly held in this State that the party complaining of such a settlement must not only surcharge it, but allege in his petition specifically the errors relied on. Tanner v. Skinner, 11 Bush 129; Allen v. Westfall, 8 Ky. Law Rep. 63; Kirtley v. Jameson, 6 Ky. Law Rep. 740; Fielder v. Harbison, 93 Ky. 482, 20 S. W. 508, 14 Ky. Law Rep. 481. The appellee, therefore, cannot get along in this action, if he has lost his right to surcharge the guardian's settlement." The case of Robinson's Committee v. Elam's Ex'r, 90 Ky. 300, 14 S. W. 84, 11 Ky. Law Rep. 307, also involved the question we have here, and in order to recover in that case of the administrator of a decedent's estate, it became necessary to surcharge his settlement, and it was there held that the statute of limitation barred the claim. These two adjudications are conclusive of the question we have here. Appellant's trouble seems to be in confusing the two positions which appellee occupies; that of execu-

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trix of her husband's will, and that of life tenant. His right to surcharge the settlements of the executrix is entirely distinct from and independent of such right as he may have against the tenant for life, and these separate rights are not to be confused or confounded. The fact that the life tenant and the executrix are the same person does not in any wise alter the principle herein announced. If the executrix and the life tenant had been different persons, the confusion we have referred to would not have occurred. Now, it is manifest that whatever delinquency or misdoing the executrix was guilty of she must answer as such, and not as life tenant. If a third person had been executor of the will of James W. Wren, and had done with his estate precisely what appellee did, this suit would have been brought alone against the executor, and not against the life tenant; and if a third person had qualified as executor and made the false and fraudulent settlements alleged to have been made by appellee, under the authority of the cases above cited, a plea of the 10 years' statute of limitation would have barred an action to surcharge.

This action to surcharge the settlement of a fiduciary for fraud does not fall within the provision of section 2543, Ky. Stats. 1903, which is as follows: "The provisions of this chapter shall not apply in the case of a continuing and subsisting trust, nor to an action by a vendee of real property in possession thereof, to obtain a conveyance." This statute applies only to such continuing trusts under which the trustee has the right to hold the estate, and the cestui que trust has no right to sue for it. Robinson v. Elam, 90 Ky. 300, 11 Ky. Law Rep. 307, 14 S. W. 84; Hargis v. Sewell, 87 Ky. 63, 9 Ky. Law Rep. 920,

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7 S. W. 557; Blake v. Wolfe, 105 Ky. 380, 49 S. W. 19, 50 S. W. 2, 20 Ky. Law Rep. 1212. In this case the tenant in remainder had the same right to bring the action to surcharge appellee's settlements on the day after they were made as he had in 1906; and, this being true, the 10 years' statute of limitation applies and bars his right. The authorities cited by appellant from those jurisdictions where the statutes of limitation do not bar equitable rights have no application in this State. Here the statutes of limitaton apply to all actions, whether they be based upon equitable or legal rights, and the court has no discretion, but must apply them when properly pleaded, although the action is based purely upon an equitable right. Our statutes of limitation are framed and designed to fix a time beyond which every right to bring an action must be barred unless specially excepted from their provisions. Section 2522 provides that: "An action for relief not provided for in this or some other chapter, can only be commenced within ten years next after the cause of action accrued." This shows an intent to cover the whole field of litigation. As said before, the cause of action to surcharge the accounts of the executrix accrued to the appellant when they were made. After the lapse of 10 years without action, he cannot in the face of a plea of the statute of limitation maintain this one. The statute of limitation is, of course, one of repose, and enacted for the purpose of fixing some definite time when every action shall be either brought or barred. It would be intolerable, if demandants could sleep on their rights for an indefinible time, and after all the evidence which would protect the defendants has vanished that he should be called on to defend the claim when no defense could

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then be shown. As an illustration, take the case in hand. A part of appellant's objection to the settlements is that some of the vouchers supporting the claims paid by the fiduciary were not prepared according to the terms of the statute, and that therefore she was not entitled to credits for the payments. Now, perhaps, it has become impossible to obtain vouchers for these claims, although if the objection had been made earlier the executrix could have amended the fault complained of. This merely illustrates the wisdom of the statute in fixing a time after which one who undertakes to discharge his legal duties may feel that he is secure from adverse litigation concerning them. The statute was designed to effectuate a wise and beneficent purpose, and should be given a liberal, rather than a narrow, construction in order to carry out the intention of the lawmakers.

Judgment affirmed.

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CASE 84.—PROSECUTION AGAINST THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY FOR MAINTAINING A PUBLIC NUISANCE.—October 16.

Cincinnati, N. O. & T. P. Ry. Co. v. Commonwealth

Appeal from Mercer Circuit Court.

W. C. BELL, Circuit Judge.

Defendant convicted and appeals. Reversed.

1. Railroads—Operation—Regulations—Violations—Indictment.—An indictment charging a railroad company with running its trains through an incorporated town at an unreasonable rate of speed and without the customary warning signal charges a public nuisance.
2. Same.—To find a railroad company guilty of committing a public nuisance by running its trains through an incorporated town at an unsafe rate of speed, without signals at a crossing therein, it is necessary, not only to prove an habitual rapid running of the trains, but also that such running was without necessary warnings to avoid injuring those using the crossing.
3. Same—Negligence.—The rapid running of a train over the streets or crossings of a town, which will render unavailing signals that may have been given of its approach, is evidence of negligence, entitling a person injured thereby to recover damages.
4. Same—Municipal Corporations—Police Power—Regulation of Trains.—Ky. Stats. 1903, section 786, requiring every railroad company to sound the whistle and ring the bell outside of incorporated cities at least 50 rods from a crossing, and to give such signals in cities as the legislative authorities thereof may require, confers on municipalities the exclusive power to determine by ordinance what signals shall be given therein by trains running through their corporate limits, whether on the streets or crossings.

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5. Same.—Under Ky. Stats. 1903, section 3074, authorizing towns of the sixth class to enact police regulations not conflicting with the general laws, a town of the sixth class may require a railroad company to use such reasonable precautions as to the speed of its trains in approaching a crossing or passing through its limits as may be needful for the safety of the public.
6. Same—Evidence—Admissibility.—Where, on a trial of a railroad company for committing a public nuisance by running its trains through an incorporated town at an unsafe speed without giving warning at public crossings, the evidence showed that it stationed a watchman at a crossing, it was proper, as bearing on its good faith, to show that it placed the watchman there pursuant to a requirement of the railroad commissioners, though the commissioners exceeded their authority.
7. Same—Evidence—Sufficiency.—On a trial of a railroad company for committing a public nuisance by running its trains through an incorporated town at an unsafe speed without giving warning at a crossing, evidence held to require an acquittal, though the trains were run at an unreasonable rate of speed.

E. H. GAITHER, attorney for appellant.

JOHN GALVIN, of counsel.

THE LAW.

That a railroad company has the right in this state to run its trains at any reasonable rate of speed is the settled law of the state. (Louisville, Cincinnati & Lexington Railway Company v. the Commonwealth, 80 Ky. 143.) But, as a protection to the traveling public, the company is required to give the warning signals.

It is not contended by the commonwealth in this indictment that the rate of speed in any way contributed to the danger. The danger consisted in a failure to give proper warnings. It is not denied, in fact it is admitted, that every precaution prescribed by the legislature, has been observed by the appellant, and we submit that the delegation by the legislature of a right to the railroad commissioners to determine what precautions are necessary for the public safety, coupled with the statute prescribing exactly the signals required at crossings is an exact determination of the company's duties, and that no jury has the

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right to either increase or diminish these requirements. We submit that the appellant has violated no law, and that the verdict and judgment in this case is illegal and unwarranted, and we respectfully ask a reversal.

AUTHORITIES CITED.

Kentucky Statutes, section 786; Kentucky Statutes, section 774; Louisville, Cincinnati & Lexington Railway Co. v. Commonwealth, 80 Ky. 143.

N. B. HAYS, Attorney General, and C. H. MORRIS for appellee.

"To secure the reasonable and proper use and enjoyment of the public road by the public and of the railroad by its owners, each must be required to observe the maxim of law that every person is restricted against using his property to the prejudice of others." (Cin. R. R. Co. v. Commonwealth, 80 Ky. 137.)

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

This appeal is prosecuted from a judgment entered by the court below upon the verdict of a jury finding appellant guilty of committing a public nuisance and fixing its punishment at a fine of $500. The indictment under which the trial was had specifically charges that appellant did "unlawfully, willfully, habitually, and for an unreasonable length of time run its trains at an unsafe and unreasonable rate of speed and so rapidly as to endanger and hazard the safety and life of persons traveling upon the turnpike leading from Harrodsburg to and through Burgin, which was and is a public highway, at a point where said railroad crosses said pike in Burgin, an incorporated town, and at a point where there is much travel in buggies and vehicles and by pedestrians, and this without sufficient and necessary warning to prevent the danger, hazard, and inconveni-

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ence to public travel." Appellant filed a demurrer to the indictment, which was overruled, as was its motion for a peremptory instruction, made at the conclusion of the Commonwealth's testimony, and motion for a new trial following the verdict and judgment.

According to the evidence Burgin is a town of the sixth class, with a population of about 1,000. Appellant's road runs through it north and south, and the turnpike mentioned in the indictment is its principal thoroughfare or street, and the only one of the town crossing the railroad. The Burgin post office, school, and churches, as well as its principal business houses, are situated east of the railroad, and its main residence section west thereof. There is a large amount of travel over the crossing during the day, but the night travel is less than a third as great. Each day and night several of appellant's fast trains, both passenger and freight, pass through Burgin without stopping. At and near the crossing are numerous side tracks, which are often occupied by empty or loaded freight cars, both day and night; and when this is the case it is difficult for persons approaching the crossing to see appellant's trains coming from the south. According to the Commonwealth's evidence appellant's through trains usually pass Burgin at a speed of 40 to 70 miles an hour. On the other hand, appellant's testimony was to the effect that these trains ran through the town at 25 to 50 miles an hour. The Commonwealth's testimony also showed that a watchman was kept at the crossing by appellant from 6 a. m. to 6 p. m. each day, but wholly failed to show that the trains of appellant, in approaching and passing through Burgin, did not give the usual and proper signals, while that of appellant showed that such signals were invariably given; and

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there was no contrariety of evidence as to the further fact that no one had ever been injured at or near the crossing by appellant's manner of operating its trains.

Appellant's complaint of the trial court's action in overruling its demurrer to the indictment cannot be sustained. If, as charged in the indictment, appellant willfully, habitually, and for an unreasonable length of time ran its trains through Burgin at such a rapid, unreasonable, and unsafe rate of speed as to endanger the lives or safety of persons using the crossing, and this, as in substance further alleged, was habitually done without the customary and necessary warning signals of their approach, these acts were suffifficient to constitute the offense charged. In Louisville, Cincinnati & Lexington Railroad Company v. Commonwealth, 80 Ky. 143, 3 Ky. Law Rep. 644, 44 Am. Rep. 468, an indictment for a common-law nuisance, charged to have been committed by appellant at a crossing of the turnpike and its railroad by "habitually running its trains at an unsafe and unreasonable rate of speed, and so rapidly as to endanger, hazard, and injure persons traveling upon the turnpike, without giving warning signals or taking precautions to avoid injuring such persons by approaching trains," was held to sufficiently state a public offense. As in language and meaning the indictment in the case at bar is substantially the same as that of the case supra, we are constrained to hold that the demurrer to it was properly overruled.

We are of opinion, however, that the evidence introduced by the Commonwealth in this case did not warrant a conviction; for, in order to find appellant guilty of the offense charged, it was necessary, not only that it should have proved such habitually rapid

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running of its trains by appellant as was reasonably calculated to endanger or injure persons using the crossing, but also that such running of its trains was without the necessary warning signals or other precautions to avoid injuring those using the crossing. According to the evidence appellant's trains, in approaching the Burgin crossing, always gave the customary statutory signals, in addition to which appellant took the precaution to keep a watchman at the crossing from 6 a. m. to 6 p. m. each day. This view of the law was adopted by the court in L., C. & L. R. R. Co. v. Commonwealth, supra. The opinion, after stating the facts as to the character of the crossing in that case, the obstructions near it, its large and constant use by the traveling public, and the speed at which the railroad company ran its trains in approaching it, proceeds to say: "This evidence clearly establishes the fact that the safety of the numerous persons passing over the crossing requires that warning signal should be given of the approach of trains. The jury by their verdict in effect found that appellant habitually failed to give such signals, and, as they were necessary to the safety of the public from danger of approaching trains, the appellant was legally convicted, unless the finding of the jury is without evidence to support it. There is evidence of the failure to give any warning signals on several occasions, and the testimony introduced by appellant to establish the custom of ringing the bell or sounding the whistle on the approach of trains to the crossing does not show that such signals were universally given, and it lacks some of the elements of certainty." L. & N. R. R. Co. v. Commonwealth, 13 Bush 390.

We have in this State no statute regulating the rate of speed at which railroads shall operate their

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trains, and while, in civil actions brought by persons for injuries resulting from the alleged negligence of railroad companies, this court has time and again held that such rapid running of a train over the streets or crossings of a town or city as would render unavailing signals that may have been given of its approach was such evidence of negligence as would entitle the person injured thereby to recover damages, it has never undertaken to fix a rate of speed at which trains should be operated in towns or cities, and manifestly could not do so, in the absence of a statute or ordinance authorizing it. Its rulings have gone no further, therefore, than to decide whether the facts of such cases as were brought to it for review did or did not show negligence. The rule announced by this court in civil actions for injuries alleged to have been received on the streets or crossings of a town or city through the negligence of those operating railroad trains is that greater care should be used in running trains on the streets or crossings of a town or city than is required to be exercised in approaching highway crossings in the country, because of the larger amount of travel and constant presence of persons on the streets and crossings. Under such circumstances, in addition to giving and continuing the customary signals and keeping a constant lookout, the trainmen should reduce the speed of the train, so as to lessen the danger of injury to persons on the street or crossing from its movements. McCabe's Adm'x v. Maysville & Big Sandy Ry. Co., 89 S. W. 683, 28 Ky. Law Rep. 536. On the other hand, the rule as to the degree of care to be used by those in charge of a train in approaching a country crossing is, not that the speed of the train be slackened, but that, where the speed of the train is great,

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eare in giving warning of its approach to the crossing should be commensurate with the danger to be avoided. L. & N. R. R. Co. v. Molloy's Adm'x, 28 Ky. Law Rep. 1113, 91 .S W. 685, 122 Ky. 219.

But, in order to sustain a penal prosecution against a railroad company for running its trains in city or country at a high or even dangerous rate of speed, either upon a street or in approaching a crossing, it must be shown that such running of the trains was attended with a failure on the part of those operating them to give the necessary and usual signals of their coming. Section 186, Ky. Stats. 1903, provides: "Every (railroad) company shall provide each locomotive engine passing upon its road with a bell of ordinary size and steam whistle, and each bell shall be rung, or whistle sounded outside of incorporated cities and towns of a distance of at least fifty rods from the place where the road crosses upon the same level any highway or crossing, at which a signboard is required to be maintained, and such bell shall be rung or whistle sounded, continuously or alternately, until the engine has reached such highway crossing, and shall give such signals in cities and towns as the legislative authorities thereof may require." It will be observed that the last clause of section 786 confers upon the legislative authorities of all cities and towns of the Commonwealth the exclusive power to determine and by ordinance declare what signals shall be given therein by trains running through their corporate limits, whether upon the streets or crossings. In Chesapeake & Ohio Railway Company v. City of Maysville, 69 S. W. 728, 24 Ky. Law Rep. 615, the validity of an ordinance of the appellee city compelling the appellant railway company to erect and maintain gates at certain crossings in the city was

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attacked upon the ground that it was unconstitutional and its enforcement would amount to usurpation on the part of the city of power vested by law in the railroad commissioners and which could be exercised by them alone. Both contentions were rejected by this court; the opinion declaring that the charter of Maysville, a city of the fourth class, expressly authorized the enactment of the ordinance, and, in addition, that section 774, Ky. Stats. 1903, under which the power in question was claimed for the railroad commissioners, only authorized them to compel the erection and maintenance of gates at highway crossings within a mile of the corporate limits of any city or town of this Commonwealth.

Not only may the town of Burgin, under the power conferred by section 786 of the Statutes, supra, by ordinance require appellant to adopt such signals as may be reasonably necessary to give warning of the approach of its trains to the crossing in question, but it may require of it such other reasonable precautions as to the speed of the trains in approaching the crossing or passing through the corporate limits of the town as may be needful for the safety of the public; for a town of the sixth class, like Burgin, is by the provisions of subsection 7, section 3704, Ky. Stats. 1903, empowered through its board of trustees "to * * * enact and enforce within the limits of said town all other local, police, sanitary and other regulations as do not conflict with the general laws." While, in requiring appellant to keep a watchman at the Burgin crossing, the railroad commissioners may have transcended their authority, it was a precaution which inured to the benefit of the citizens of that town. The testimony as to the stationing of the watchman at the crossing and the

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purpose thereof having properly been admitted by the court, we do not think it would have been improper to admit the testimony offered by appellant to the effect that in placing the watchman at the crossing it acted upon a suggestion or requirement of the railroad commissioners, as it tended to show appellant's good faith in attempting to protect persons using the crossing against the dangers arising from the passing of its trains. We do not mean to say that appellant should have been acquitted because of the failure of Burgin's board of trustees to adopt an ordinance with respect to the signals to be given by appellant's trains in approaching the crossing, or running through the town; but as, according to the evidence, appellant's trains in approaching the Burgin crossing universally gave the warning signals required by statute in respect to crossings outside of incorporated towns and cities, and in addition kept a watchman at the crossing each day during the hours mainly devoted to travel on the turnpike and crossing, these facts, in the absence of an ordinance of the town of Burgin requiring other than the statutory warning signals from appellant's trains in approaching the crossing, entitled appellant, notwithstanding the fast running of its trains, to an acquittal at the hands of the jury. We are of opinion, therefore, that the trial court, after the introduction of all the testimony, should have peremptorily instructed the jury to find appellant not guilty.

For the reasons indicated, the judgment is reversed, and case remanded for a new trial and other necessary proceedings consistent with the opinion.

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CASE 85.—ACTION BY RACHEL RADERS ADMRX. AGAINST THE LOUISVILLE & NASHVILLE R. R. CO., FOR CAUSING THE DEATH OF HER INTESTATE.—October 16.

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Rader's Admrx. v. Louisville & Nashville R. R. Co.

Appeal from Laurel Circuit Court.

H. C. FAULKNER, Circuit Judge.

From a judgment awarding a peremptory instruction in favor of defendant the plaintiff appeals. Reversed.

1. Railroads—Actions for Injuries on Tracks—Negligence—Questions for Jury.—In an action against a railway company for the negligent killing of plaintiff's intestate while on defendant's track, evidence considered, and held sufficient to go to the jury.
2. Same—Operation—Care Required as to Trespassers.—Failure of those in charge of a train to give warning of a railroad train passing through a city or town or approaching a crossing is negligence of the greatest degree, and such failure will render the company liable for injury caused, even to a trespasser.
3. Same.—Railroad company is liable for an injury done to a trespasser, as well as to a person lawfully upon its track, if his peril was, or by the exercise of that character and degree of care required in operating railroad trains might have been, discovered in time to prevent or avoid injury to him.
4. Same—Actions for Injuries—Negligence—Questions for Jury.—Where a railroad company has knowledge of a trespasser or licensee on its tracks or notice of their expected and probable presence, the rate of speed may be negligent as to them, and whether it is negligence is a question for the jury.

W. E. BEGLEY and R. A. DYCHE for appellant.

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CASES AND AUTHORITIES CITED.

1. The court erred in giving peremptory instructions to the jury to the prejudice of appellant. (Southern Ry. in Ky. v. Goddard, 89 S. W. 675; Miller v. Metropolitan Life Ins. Co., 88 S. W. 183; Fugate v. City of Somerset, 29 S. W. 979, 16 Ky. Law Rep. 807; Budford v. L. & N. R. R. Co., 82 Ky. 286; Thompson v. Thompson, 17 Ben Monroe 22; Payne Clothing Co. v. Payne, 21 Ky. Law Rep 1226, 11 Bush 265; Wilmurth's Admr. v. Ill. Central. R. R. Co., 76 S. W. 193; Ill. Central R. R. Co. v. Murphy's Admr., 97 S. W. 729; Davis v. Louisville, Henderson & St. L. Ry. Co., 97 S. W. 1122; K. & I. Bridge Co. vs. Sydon, 87 S. W. 989, and 26 Ky. Law Rep. 951; Price's Admr. v. L. & N. R. R. Co., 76 S. W. 836.)

2. Petition is not defective because it does not negative contributory negligence. (Stephens on Pleadings, 350; Depp v. Louisville, &c., R. R. Co., 14 S. W. 363; Louisville, &c., Canal Co. v. Murphy, 9 Bush, 522; Louisville, &c., R. R. Co. v. Wolfe, 80 Ky. 82; Encyclopedia of Pleading and Practice, vol. 5, p. 1 to 4, inclusive.)

BENJAMIN D. WARFIELD, attorney for appellee.

J. W. ALCORN of counsel.

POINTS DISCUSSED AND AUTHORITIES CITED.

1. The testimony shows that plaintiff's intestate was not in a place of peril until the engine was within a few feet of her, when she stepped upon the main track or close enough thereto to be instantly struck by the pilot beam of the engine after the cow-catcher had passed her. Decedent did not take, and counsel for appellant concede that decedent did not take, any precautions for her own safety. She was guilty of contributory negligence as a matter of law, and the trial court properly instructed the jury that because of her own negligence, but for which the accident would not have happened, there can be no recovery in this case. (L. & N. R. R. Co., v. Creighton, 106 Ky. 42; Ib. v. Smith, 107 Ky. 178; L. & N. R. R. Co. v. Redmon's Admx., 28 Ky. Law Rep. 1293; Brown's Admr. v. L. & N. R. R. Co., 97 Ky. 228; Yates v. I. C. R. R. Co., 28 Ky. Law Rep. 75; Freel's Admr. v. L. H. & St. L. R. R. Co., Ib. 76; L. H. & St. L. R. R. Co. v. Hathaway's Exor., Ib. 628; Smith's Admr. v. I. C. R. R. Co., Ib. 723; L. & N. R. R. Co. v. Daniel, Ib. 1146; I. C. R. R. Co. v. Johnson, 27 S. W. 745; Hoskins' Admr. v. L. & N.

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R. R. Co., 17 Ky. Law Rep. 78; Johnson v. Paducah Ldy. Co., 29 Ky. Law Rep. 59; Groves v. L. & N. R. R. Co., 96 S. W. 439, 29 Ky. Law Rep. 725; Elliott v. L. & N. R. R. Co., 30 Ky. Law Rep. 471; Gregory v. L. & N. R. R. Co., 25 Ky. Law Rep. 1986; Davis v. L. H. & St. L. Ry. Co., 97 Ky. 1122; Parkerson's Admx. v. L. & N. R. R. Co., 25 Ky. Law Rep. 2260; L. & N. R. R. Co. v. Mounce's Admr., 28 Ky. Law Rep. 933; R. Co. v. Williford, 115 Tenn. 115; Elliott v. C. M., &c., R. R. Co., 150 U. S. 248; Patton, Admr. v. Ry. Co., 89 Tenn. 379; Brennan v. D. L. & W. Ry Co., 83 Fed 124, 27 C. C. A. 418; Grethan Admr. v. C. M. & St. P. R. R. Co., 22 Fed. 610; K. C. F. S. & M. Ry. Co. v. Cook, 66 Fed. 113, 13 C. C. A. 364; L. H. & St. L. R. R. Co. v. Jolly's Admr., 28 Ky. Law Rep. 989.

2. It was negligence in decedent, whose hearing and sight were obstructed and obscured by the sunbonnet and umbrella not to have exercised greater precaution in approaching the railway track than would have been required of her if her sight and hearing had not been thus voluntarily impaired. (Thompson's Commentaries on the Law of Negligence, vol. 2, sections 1658, 1659, 1660; L. & N. R. R. Co. v. McCombs, 21 Ky. Law Rep. 1232.)

OPINION OF THE COURT BY JUDGE NUNN—Reversing.

This is an appeal from a judgment of the Laurel circuit court in which appellant sought to recover damages of appellee for the negligent destruction of her intestate's, Rachael Rader's, life. When appellant closed her evidence, appellee moved for a peremptory instruction, which was overruled. However, at the close of all the testimony, appellee renewed its motion for a peremptory instruction, and the court sustained the motion and gave the instruction, to which appellant objected and excepted.

Therefore the only question is: Was there any, a scintilla, of testimony supporting appellant's cause of action? This necessitates the consideration of the evidence introduced. Rachael Rader, the deceased, was 12 years and 11 months of age at the time she

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was killed. She lived in the town of Pittsburg, Ky., nearly one-half mile from the station. The population of the town was at the time about 1,000 or 1,200. The town was located in the main, so that the business and dwelling houses faced and were on each side of the railroad track; there being a roadway on each side. The track was so constructed through the city that in some places it was elevated a few feet above the level of the dirt roads. There was only one street, or public road, over which vehicles could cross the track, and that was near to and south of the station. The railroad passes through the town in a northern and southern course; and more than one-half is within the town limits. This little girl, on the afternoon of January 3, 1903, was sent by her mother to the Pittsburg Company's store, which is situated on the west side of the railroad, and several hundred feet south of the station and this crossing for vehicles, and to the post office. She obtained the article, tobacco, from the store which she was sent for, and started to the post office, which is situated near the station and on the east side of the railroad. She came out of the store, passed between some piles of lumber, which were stacked near or in front of the store, and then moved along a path leading in the direction of the post office. She was going in a northwestern course, which placed her right side or back nearest to the train which was coming from the south. She was walking slowly, and appeared to be trying to raise an old umbrella. According to appellant's proof, it was raining or sleeting at the time. She crossed appellee's passing track, and walked a few steps along the main track, stopped and placed one foot upon the end of a tie, and made another effort to raise the umbrella, when the crossbeam of

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the engine struck her on the right side of the head, and killed her. All the testimony tends to show that she was from the time she left the store apparently unconscious of the approach of the train. The fireman testified that he saw her from the time she came from behind the piles of lumber until she was killed, but did not believe she would go upon or near the track. When he first saw her, he was about a quarter of a mile away, and the engineer and fireman both testified that the whistle was blown for the station and semaphor about that distance from the station, and the bell was rung continuously until the girl was killed. Appellant's testimony agrees with appellee's with reference to the blowing of the whistle, but contradicts it with reference to the ringing of the bell. The engineer testified that he had run a train through the town of Pittsburg for nearly 18 years, and that "he was always looking out for people on the track. There are always a lot of people there. It is a mining town, and we always keep a sharp lookout for them." The evidence conduces to show that persons repeatedly crossed back and forth over this railroad track during the day with the knowledge of the servants of appellee in charge of its trains. It also appears that this train was being run at the rate of 25 or 30 miles an hour, and consisted of 26 heavily loaded cars, excluding the engine, tender, and caboose, and those in charge were not able to stop it until it ran the full length of the train and three or four car lengths in addition. With this evidence before the jury, in our opinion, the court erred in giving the peremptory instruction. The evidence conduced to prove that appellant's servants were negligent in failing to ring the bell as they approached the deceased; at least, there was conflict of proof on this

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point, and they were moving the train at a negligent and dangerous rate of speed through the town.

In the case of East Tennessee Coal Co. v. Harshaw, 29 S. W. 289, 16 Ky. Law Rep. 526, the court said: "The evidence shows the engineer of that coal train did not signal its approach to the crossing by either whistle or bell; and that the railroad was for about 200 yards beyond straight enough to enable the engineer to see a person at or near that point. The failure of those in charge to give warning of a railroad train passing through a city or town, or approaching a crossing of a street or public road, has been held by this court negligence of the greatest degree, and will render the company owing it liable for injury caused by such failure, even to a trespasser. It is also well settled that such company is liable for injury done as well to a trespasser as to a person lawfully upon it track, if his peril was, or by exercise of that character and degree of care required in operating railroad trains might have been, discovered in time to prevent or avoid injury to him." In the case of Illinois Cent. R. R. Co. v. Murphy's Adm'r, 123 Ky. 787, 97 S. W. 729, 30 Ky. Law Rep. 93, the court said: "If the railroad company knows that the public habitually uses its tracks and right of way in a populous community as a foot passway, so that it knows that at any moment people may be expected to be found thereon, such knowledge is treated as equivalent to seeing them there, and their presence must be taken into consideration by the train operatives in the movement of their trains Such foot passengers may be in law only trespassers or licensees—they may, indeed, have no legal right to be there or to use the track—but the question comes back: If they are there and known to be there, what

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then is the company's duty as to running its trains? It is admitted that the company has the superior right—nay, maybe has the exclusive right—to the track, and that some way ought to be provided for keeping trespassers off them altogether But the fact remains the tracks are open, inviting for easy travel, are traveled constantly, and so known to be by the company. The difference between the cases in the country and those in thickly settled towns and cities is one of practical materiality. In the country there are occasional sporadic uses of the tracks by foot passengers. But they are comparatively rare. To compel the railroad trains to creep along under full control in anticipation of what probably would not occur, viz., the meeting or overtaking of a stray trespasser, would not be reasonable, because most likely wholly unnecessary. But in populous communities the probabilities are all the other way. The foot passengers from long habit of use, which are known to and suffered by the company, may reasonably be expected at all times, and in any number. It is more than a mere probability—it is a reasonable certainty that they will be found there. The company should no more shut its eyes to such a probability within its knowledge than to the actual fact of the presence when known. We will not say that to dash at uncontrollable speed through such a town, where people are known to be using the tracks for passing, is not negligence. Let the jury say whether it is. The trial court did not submit this phase of the case to the jury. On the contrary, it was assumed that the company had the right to run its trains at that point at any rate of speed it desired, but that it must keep a lookout for trespassers, and if those in charge of the train saw, or by the exercise of ordinary care

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could have seen, decedent in time to have avoided injuring him, it was their duty to do so. There are cases which hold that the rate of speed in towns may or may not be negligent without respect to an ordinance. And it is held that where trespassers are on the railroad track, their presence being unknown, the rate of speed is never negligent as to them, because no duty whatever was then owed to them by the railroad company. But we think the correlative principle must apply that, where there is knowledge of the presence of trespassers or licensees, or, what is equivalent, notice of their expected and probable presence, the rate of speed may be negligent as to them, because there is then a duty to them, viz., to look out for them, and take care not to run over or injure them." See, also the case of I. C. R. R. Co. v. Wilson, 63 S. W. 608, 23 Ky. Law Rep. 684.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

Petition for rehearing by appellee overruled.

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CASE 86.—ACTION BY THE HAZARD BANK AGAINST THE GERMAN INSURANCE COMPANY ON A FIRE INSURANCE POLICY.—October 17.

German Ins. Co. v. Hazard Bank

Appeal from Perry Circuit Court.

M. J. Moss, Circuit Judge.

Judgment for defendant, plaintiff appeals—Affirmed.

1. Venue—Adjustment of Loss Under Insurance Policy—Action on Award of Arbitrators.—An action on an award of arbitrators appointed as provided in a fire policy may be brought in the county where the award was made and the property situated, though the policy was made elsewhere.
2. Contracts—Rights of Election—Notice.—A party to a contract who has the right to make an election thereunder, on giving notice thereof to the other party, must, on exercising the right, give such notice as will leave no doubt of an intention to exercise such right.
3. Insurance—Fire Insurance—Election to Rebuild—Notice.—The election of an insurer to rebuild must, to be available as a defense on the policy, be clear, and must be carried out within a reasonable time.
4. Same.—A notice by an insurer entitled under the policy to rebuild, which recites that it will exercise its right to rebuild, unless insured will accept a cash offer as a compromise, is insufficient, because it undertakes to use the privilege of rebuilding as a means of forcing the insured to accept a compromise.
5. Same.—Where an insurer failed to give proper notice of its intention to elect to repair, as authorized by the policy, the insured, after the expiration of the time in which the notice could be given, could repair.
6. Same—Adjustment of Loss—Award—Validity.—An umpire, selected by appraisers appointed to determine the loss under

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a fire policy, notified the appraisers that he would only act on condition that he could call in an expert builder to advise him as to the amount of the loss. He advised with a carpenter who viewed the premises at his request. Held, that the act of the umpire did not invalidate the award founded on his own judgment.

7. Same.—Under a fire policy providing for the appointment of appraisers who shall select an umpire who shall act with them in matters of differences, and declaring that the award of any two of them shall be binding, an award made by the umpire and one of the two appraisers is binding, though made in the absence of the other.

LEWIS APPERSON attorney for appellant.

ERRORS COMPLAINED OF.

1. The court erred in overruling the motion to quash the summons and return thereof.

2. The court erred in overruling the special demurrer to the jurisdiction of the court.

3. The plea to the jurisdiction of the court contained in the first paragraph of the answer, should have been sustained, and the action dismissed.

4. The court erred in not sustaining appellants motion to instruct the jury to find for the defendant.

5. The court erred in refusing to permit the amended answer to be filed, because it conformed to the proof.

AUTHORITIES CITED.

Civil Code, section 71; Ky. Mut. Security Fund Co. v. Logan's Admr., 12 Ky. Law Rep. 328; Sun Mutual Ins. Co. v. Crist, 19 Ky. Law Rep. 305; Cyclopedia Law & Pro., vol. 3, pp. 617, 638 and 653; Henderson v. Buckley, 14 Ben Monroe 294.

BAILEY P. WOOTTEN and JESSE MORGAN for appellee.

GREENE & VAN WINKLE of counsel.

AUTHORITIES CITED.

1. As to jurisdiction: (Civil Code, sections 71, 763; Kentucky Statutes, section 631; Kentucky Mutual Insurance Company v. Logan, 90 Ky. 364; Mutual Fire Insurance Company of New York v. Hammond, 106 Ky. 386; 14 Bush 74; 93 Ky. 315; 5 Ky. Law

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R. p. 250; American Fire Insurance Company v. Bland, 40 S. W. 670.)

2. As to defendant's motion to instruct the jury: (Tandy v. Oliver, 19 Ky. Law Rep. 223.) As to amended answer: (Civil Code, sections 338 and 756.)

3. As to notice to repair: (Fireman's Fund Insurance Company v. Caye, &c., 14 Ky. Law Rep. 310; 13 American and English Encyclopedia of Law 379; Good v. Buckeye Mutual Fire Insurance Company, 43 Ohio Stat. 394; Same 380; Reiger v. Mechanic Insurance Company, 69 Mo. App. 674.)

4. As to appraisement and award: (Hall v. Norwalk Fire Insurance Company, 57 Ct., 105; Bangor Savings Bank v. Niagara Fire Insurance Company, 85 Me., 68; 3 Cyc., 638; 14 B. Monroe, 236; 2 American and English Encyclopedia of Law, 642, 645, 646; 16 N. S., 188; Ky. Stats., section 448; Civil Code, section 679; 86 Ky., 23; 106 Ky., 515; 18 Ky. Law Rep., 860; 13 American and English Encyclopedia of Law, 363; Bradshaw v. Agricultural Insurance Company, 137 N. Y., 137; Hartford Fire Insurance Company v. Asher, 100 S. W., 233.

OPINION OF THE COURT BY JUDGE BARKER—Affirming.

The appellant issued to the appellee a fire insurance policy in the sum of $3,000 on its bank building in Hazard, Ky. On the 25th day of March, 1905, the building was partially destroyed by fire. Formal proofs of loss were given by the bank to the insurance company on the 6th day of April, 1905. On April 13, 1905, the company demanded the appointment of appraisers to determine the amount of the damage to the building. This procedure was under a clause in the policy to be hereafter noticed. Each party selected an appraiser, and these selected an umpire to determine all matters upon which they could not agree. The appraisers being unable to agree, the umpire and one of them fixed the damage at $2,508.38 and awarded that amount to the bank. The insurance company refused to pay the award so made, and

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gave notice under another clause in the policy to be hereafter discussed that it would repair the building, and afterwards sent a mechanic to Hazard in order to make the necessary repairs to restore the building. The bank refused to allow the employe of the insurance company to make the repairs, and instituted this action in the Perry circuit court to recover on the award. Several defenses were interposed, and on the trial, after all the evidence was in, the court awarded a peremptory instruction to the jury to find for the plaintiff the full amount of the award as prayed in the petition, and of this ruling the company is complaining.

The first defense interposed was the want of jurisdiction in the Perry circuit court to determine the controversy. The appellee bank is a resident of Perry county, Ky., and its building is situated in the county seat, Hazard. Appellant has no agent in Perry county, but has an agent at Mount Sterling, Montgomery county, Ky., where the policy was written. The theory of the appellant as to the want of jurisdiction in the Perry circuit court is based upon its claim that the contract with its agent was made in Montgomery county, where the policy was written. To this proposition the appellee answers that this is an action upon the award of arbitrators, and that this award was made in Perry county and not in Montgomery, and therefore the Perry circuit court and not the Montgomery circuit court had jurisdiction to try the issues between the parties. The evidence clearly shows that the appraisal and award were made in Perry county, and this being a suit upon the award, we are of opinion that the position taken by appellee is sound. The very question we have here arose in the case of Mutual Fire Insurance Company of New

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York v. Hammond, 106 Ky. 386, 20 Ky. Law Rep. 1944, 50 S. W. 545, and it was there held that the court in the county where the award was made had jurisdiction of the action upon it. It follows, therefore, that the trial court rightfully assumed jurisdiction of this action.

Appellant insists that, under the terms of the policy, it had the right to restore the building to its former condition in lieu of paying the award which was made, and that it offered to do so, but that the appellee bank refused to allow it to exercise this privilege. The provision in the policy as to this question is as follows: "It shall be optional, however, for this company to * * * repair, rebuild or replace property lost or damaged with other of like kind or quality within a reasonable time, on giving notice within thirty days after the receipt of the proofs herein required of its intention so to do." The only notice ever given to the bank by the appellant of its intention to exercise its right to rebuild the property is contained in a letter dated May 26, 1905, which is as follows: "Mt. Sterling, Ky., May 26th, 1905. Hazard Bank, Hazard, Ky.—Gentlemen: I am in receipt of letter from the company with regard to loss under policy 122787, requesting me to advise you that the award of the appraisers is not satisfactory, and that the company will exercise its right to repair or replace the building as stipulated in the policy, unless you are willing to accept what it would cost us to repair the building. The company authorizes me to make you a cash offer of $1,200 as a compromise. Kindly advise me promptly whether or not you accept this proposition, so that I may have draft sent forward at once, and in the event you decline I can start Mr. Williams on the job, as I have already agreed

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with him to do the work in case you prefer that we repair the building. Awaiting your advices, I am, yours very truly, (Signed) Jno. L. Coleman, General Agent." This clearly was not a proper or sufficient notice of an election to rebuild. In insurance contracts, as in all other contracts, it is incumbent upon the parties to deal with each other in a plain, simple, and straightforward manner, and, where an election is to be exercised under a contract, notice should be made in such manner as to leave no doubt in the mind of the opposite party of an intention to exercise it. The election to exercise the given right may not be coupled with some other proposition to be accepted by the opposing party in lieu of the exercise of the given right. To come to the question in hand, if the insurance company desired to exercise the right to rebuild the property, a right which it undoubtedly had, it should have exercised it by giving a plain, unambiguous notice of its intention, and not undertaken to use the privilege of rebuilding as a means to force the insured to accept a compromise. In the 13 Am. & Eng. Encyl. of Law, pp. 379-380, it is said: "Intention to rebuild or repair must be declared as prescribed by the policy, within the time fixed therein, or, if no time is fixed, in a reasonable time; and in case delivery of proofs to an agent is a sufficient service thereof, the time runs from such delivery notwithstanding the omission of such agent to forward them. In case the proofs are returned for correction and corrections are made, the time does not begin to run until the corrected proofs are delivered. Unless the policy provides the manner in which the option shall be exercised, any acts manifesting the choice of the insurer will amount to an election. But the election to rebuild or repair, in

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order to be available as a defense, must be clear and distinct, and must be carried out within a reasonable time. Where the policy permitted the insurer to rebuild unless the insured should prefer money, making no response to a notice of election to rebuild was held equivalent to a statement of no preference. The insurer may not couple an election to repair with an offer to compromise." When the mechanic, sent by the insurance company to Hazard to repair the building, reached the place in July, 1905, he found the building had already been repaired in large part by the bank. The company having failed to give the notice of its intention to repair required by the policy, it, of course, could not exercise it, and the bank had a right, after the expiration of the time in which the notice could be given, to go on and repair the building itself, as it did.

The award sued on is assailed on the ground that Jesse Morgan, the appraiser selected by the bank, was a stockholder and director therein, and one of its attorneys at the time he acted as appraiser, and that A. S. Henry, who was the umpire selected, was incompetent to act, and that the award made by Morgan and Henry was not signed in the presence of Williams, the other appraiser; and for the additional reason that the umpire, Henry, did not rely upon his own judgment as to the amount of damage, but consulted with an outside person, a professional carpenter whom he secured to come from Lexington, Ky., and view the premises. The appellant wholly failed to establish by any evidence that Morgan was an incompetent appraiser, or interested in the bank at the time he was chosen and acted as appraiser, but, on the contrary, its evidence affirmatively disproves the disqualification of the appraiser relied on.

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In so far as Henry, the umpire, was concerned, we think his position and action in the premises are not subject to adverse criticism. The evidence shows that he was an experienced man of affairs, although not a professional builder or carpenter. He notified the two appraisers who selected him that he would only agree to act upon the condition that he could call in an expert builder to consult with and advise him as to the amount of the loss. As a proposition of law, such a course is reasonable and proper; for after all the appraiser exercises his own judgment in the premises, and either accepts or rejects the advice he may receive, as he sees proper. Hall v. Norwalk Fire Insurance Co., 57 Conn. 105, 17 Atl. 356; Bangor Savings Bank v. Niagara Fire Insurance Co., 85 Me. 68, 26 Atl. 991, 20 L. R. A. 650, 35 Am. St. Rep. 341. The fact that the umpire and one of the appraisers made the award is in accordance with the terms of the policy, which, on this subject, is as follows: "The said appraisers shall first select a competent and disinterested umpire, who shall act with them in matters of differences only. The award of any two of them, made in writing, in accordance with this agreement, shall be binding upon both parties to this agreement as to the amount of the loss." This disposes of the whole of appellant's defense, and we are of opinion that the trial court correctly awarded the bank a peremptory instruction, at the close of defendant's evidence, to find for it the amount awarded.

Judgment affirmed.

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CASE 87.—ACTION BY T. J. DOUGLASS AND OTHERS AGAINST A. A. HAZELRIGG, COUNTY JUDGE, AND OTHERS TO REQUIRE HIM TO ACCEPT THE BOND OF SAID DOUGLASS AS ROAD SUPERVISOR.—October 17.

Hazelrigg, County Judge, etc. v. Douglass, etc.

Appeal from Montgomery Circuit Court.

A. W. YOUNG, Circuit Judge.

Judgment for plaintiffs, defendants appeal—Reversed.

1. Criminal Law—Appeal—Supersedeas—Operation and Effect.—Criminal Code Prac., section 348, provides that an appeal in a prosecution for a misdemeanor, must be prayed during the term at which the judgment is rendered, and shall be granted on condition that the record be lodged with the clerk of the Court of appeals within 60 days after judgment. Section 349 provides that the appeal shall not suspend the execution of the judgment, unless defendant execute before the clerk of the circuit court a bond for the payment, if the judgment be affirmed, of the fine and costs, and cause the same to be copied into the transcript, on which being lodged with the clerk of the court of appeals he shall issue a certificate that execution of the judgment is suspended. Held, That the judgment appealed from was suspended on the execution of the bond, and not only from the time of filing the transcript with the clerk of the court of appeals and issuance of his certificate.
2. Same.—Constitution section 227 provides that the judges of the county court, justices of the peace, and other officers named shall be subject to indictment for malfeasance in office or willful neglect, and, on conviction, that their respective offices shall become vacant, but that any such officer shall have the right to appeal to the court of appeals. Ky. Stats., 1903, section 3748, enacted in pursuance of section 227,

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provides that any such officer on conviction shall be fined as therein prescribed, and that the office held by him shall become vacant, but that he may appeal to a court of appeals. Held, That where, on conviction of a member of the fiscal court of malfeasance in office and judgment entered imposing a fine and declaring his office vacant, he appealed, and executed a supersedeas bond, the operation of the judgment was thereby suspended, both as to the fine and the vacation of his office, and that, pending appeal, he was entitled to perform the duties of his office.

C. C. TURNER, attorney for appellant.

J. H. HAZELRIGG of counsel.

POINTS AND AUTHORITIES CITED.

1. Election of road supervisor. (Ky. Stats., 1837.)
2. Right of justice of peace to act pending appeal from judgment of ouster. (Criminal Code, 349.)
3. The act of 1851 has not been repealed, either expressly or by implication. (Acts 1850-51, vol. 1, p. 385; Constitution 1850, article 4, section 36; Acts 1853-54, vol. 1, p. 92.)
4. Did the adoption of that Code repeal section 3 of Act 1851. (Payne v. Conner, 3 Bibb, 181; Patterson v. Caldwell, 1 Met., 489; Grigsby v. Barr, 14 Bush, 330; Commonwealth v. Watts, 84 Ky. 545.
5. Is judgment of ouster a self-executing judgment, and what is meaning of section 227, Constitution. (Section 227, Constitution of Ky.; Ky. Stats., 3748.)
6. Self-executing judgments may be suspended in Kentucky. (Elizabethtown, etc., R. R. Co. v. Ashland, etc,. Street Railway Company, 94 Ky., 478; Civil Code, 747.)

W. B. WHITE, attorney for appellee.

LEWIS APPERSON and PREWITT & SENFF of counsel.

POINTS AND AUTHORITIES.

1. A judgment of conviction of a misdemeanor is in no state of case suspended until the issual of the supersedeas by the clerk of the court of appeals. (Criminal Code, sec. 349; Commonwealth v. Howard, 81 Ky., 57.)

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2. The act of 1851, relative to proceedings against officers, has long since been repealed by the Codes and Statutes. (Broadus v. Broadus, 10 Bush, 299; Parish v. Ferguson, 83 Ky., 18; Patterson v. Commonwealth, 86 Ky., 313; Gorham v. Luckett, 6 B. M., 146; Bohannon v. Commonwealth, 95 Ky. 334; Treasurer, etc., v. Stone, 19 Ky. Law Rep., 246; Commonwealth v. Grinstead, 108 Ky., 59; Sutherland's Statutory Construction, 2 Ed., sections 269, 270, 271.)

3. A judgment of ouster on conviction for malfeasance can not be superseded. (Elliott on Appellate Procedure, sections 392 and 393; 2 Cyc., p. 908; Tyler v. Presly, 72 Cal., 290; Walls v. Palmer, 64 Ind., 493; State v. Woodson, 128 Mo., 497; Mayor v. Shaw, 14 Ga., 162; Fawcett v. Superior Court, 15 Wash. 342, 55 Am. St. Rep. 894; People v. Stephens, 98 Mich., 218; Allen v. Church, 101 Iowa, 116; State v. Meeker, 19 Neb., 444; 9 Cyc., p. 865; State v. Poindexter, 86 Pac. Rep., 176.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

The principal question involved in this case is whether or not a public officer who has been indicted and convicted of malfeasance in office, and a judgment entered upon the verdict declaring his office vacant, may suspend the operation of the judgment by an appeal and execution of a supersedeas bond, whereby pending the appeal he may perform the duties of the office. The question comes up in this way: The fiscal court of Montgomery county is composed of the county judge and six justices; thus making it necessary that four of the court, if all the members are present, shall vote in favor of a proposition before it carries. On September 22, 1906, three of the members of the fiscal court were tried before a jury and convicted of malfeasance in office; a fine of $350 being assessed against each of them, except one who was fined $100. The judgment entered upon the verdict, in addition to imposing the penalty fixed by the jury, adjudged that "the offices held by said

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defendants be, and they are here, declared to be forfeited and vacant, to all of which the defendants each object and except, and pray an appeal to the Court of Appeals, which is granted." On the same day each of them executed a sufficient appeal bond before the clerk of the circuit court. On October 6th an election was held by the fiscal court for the purpose of electing a road supervisor. All the members of the court, including those who had been convicted, were present. The three convicted justices and the county judge declined to vote for appellee Douglass, who was a candidate, but he received the votes of the other three members of the court. If the justices convicted had a right to participate in his election, he did not receive the votes of a majority of the court who were present and was not elected. If the convicted members were not entitled to vote, then the other three and the county judge constituted a quorum, and, having received the votes of three, he was elected. Afterwards the county judge refused to permit Douglass to qualify as supervisor, upon the ground that, as all the members of the court were present and entitled to vote, he did not receive the vote of a majority, and hence was not entitled to the office. Thereupon Douglass brought this action against the appellant, who was county judge, to require him to accept his bond. The lower court held that Douglass was legally elected, and directed the county judge to permit him to qualify. From that judgment, the county judge prosecutes this appeal.

Preliminary to the main question, the point is raised that although it may be conceded that, if the convicted justices had perfected their supersedeas bond previous to the time the court met for the purpose of electing a supervisor, and have thus sus-

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pended the judgment removing them from office, yet, as they had failed to perfect the appeal so as to authorize the issual of a supersedeas, the judgment of the circuit court stood in full force and effect against them. Cr. Code Prac. section 348, provides that in cases of this character "the appeal must be prayed during the term at which the judgment is rendered and shall be granted upon the condition that the record be lodged in the clerk's office of the Court of Appeals within sixty days after the judgment." Section 349 reads: "The appeal shall not suspend the execution of the judgment unless the defendant cause to be executed before the clerk of the circuit court a covenant by good surety to be approved by said clerk for the payment in case the judgment be affirmed of the fine and costs of the appeal and all damages thereon * * * and cause said covenant to be copied into the transcript upon which being lodged with the clerk of the Court of Appeals he shall issue a certificate that execution of the judgment is suspended." The justices upon the day the judgment was entered executed in the manner provided in section 349 the bond mentioned in that section; but, the clerk being unable to prepare the transcript, it was not filed in the office of the clerk of the Court of Appeals until October 19th, on which day he issued the certificate in conformity to this section.

It is the contention of appellee that, under these Code provisions, the judgment in misdemeanor cases is not suspended by the execution of a bond, nor until the transcript has been lodged with the clerk of the Court of Appeals, and he has issued his certificate. In this contention we cannot concur. The Code allows the defendant to prosecute an appeal. It provides how it shall be done, and declares that "the appeal

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shall not suspend the execution of the judgment unless the defendant cause to be executed before the clerk of the circuit court a covenant by good surety," conditioned that the judgment shall be paid in case it is affirmed. The execution of this bond suspends the execution of the judgment provided the record is lodged with the clerk of the Court of Appeals within 60 days after the judgment. When the defendant has executed his bond, all that he is then required to do to bring the case before this court is to file the record within the time allowed. It was certainly not intended by these provisions of the Code, giving the judgment defendant an appeal and a specified time in which to file his record, to say to him that, although he might execute the bond required and use every effort to have the clerk of the circuit court copy the record so that he could file it within the 60 days, after execution of the bond, and before the clerk had time to make out the record, the collection of the judgment might be enforced by levy upon his property or by taking custody of his person. If this could be done, it would deny to the judgment defendant an opportunity to enjoy the benefits conferred by the right of appeal. Although the defendant might do everything the Code required of him to stay proceedings pending an appeal, he would be deprived of all the substantial rights arising from his appeal, if the payment of the fine could be exacted or the punishment of imprisonment inflicted during the time required by the clerk in the preparation of the transcript. What advantage would it be to a defendant to execute bond and prosecute an appeal, and file his record within the time allowed, if immediately upon the rendition of the judgment, and before the clerk could possibly prepare the transcript for filing in the office of the clerk of

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the Court of Appeals, he might be arrested under the judgment and placed in jail, and required to remain there until he had served out the sentence imposed if the clerk failed to deliver the transcript until the term of his imprisonment fixed in the judgment had expired; or, if the judgment was for a fine, it might be collected by execution and paid unto the State treasury by the collecting officer within the 60 days allowed to file the transcript, and before the clerk had prepared the same. This construction would utterly destroy the purpose and effect of the provisions allowing an appeal and place the defendant in virtually the same attitude as if the right of appeal was denied. Our conclusion is that, upon the execution of the bond before the circuit clerk, the judgment is suspended, and no proceedings can be taken under it for 60 days from the date of the judgment. If within that time the record is filed in the clerk's office of this court, it goes without saying that no action can be taken towards enforcing the judgment until the appeal has been disposed of by this court. If the record is not filed within the 60 days, the suspended judgment is restored to life, and such proceedings may be had as if no bond had been executed. Commonwealth v. Howard, 81 Ky. 57. The requirement of section 349 that the clerk of the Court of Appeals shall issue a certificate that execution of the judgment is suspended is merely intended to notify all persons who might desire to enforce the collection of the judgment that the defendant has perfected his appeal by filing the record within the 60 days; so that, if a removed officer can stay a judgment of ouster against him by superseding the judgment and perfecting the appeal, the justices by the execution of the bond on Seeptember 22d were qualified to par-

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ticipate as members of the fiscal court in the election of a road supervisor on October 6th.

This brings us to a consideration of the principal question. Section 227 of the Constitution provides that "the judges of the county court, justices of the peace, sheriffs, coroners, surveyors, jailers, assessors, county attorneys and constables shall be subject to indictment and prosecution for misfeasance or malfeasance in office or wilful neglect in the discharge of official duties in such mode as may be prescribed by law; and upon conviction his office shall become vacant; but such officer shall have the right of appeal to the Court of Appeals." Pursuant to this section, the General Assembly enacted section 3748 of the Kentucky Statutes of 1903, which, after copying a portion of the section of the Constitution quoted, provides that the officer guilty shall upon conviction "be fined in any sum not less than one hundred nor more than one thousand dollars and upon such conviction the office held by such person shall become vacant, and the judgment of conviction shall so recite, but such officer shall have the right of appeal to the Court of Appeals." In behalf of the officers, it is insisted that the ouster is a part of the judgment of conviction, and that, as an appeal is allowed, it contemplates an appeal from the whole judgment—not merely a part of it—and that the execution of the appeal bond suspends the entire judgment. On the other hand, the argument is made that the supersedeas bond merely stays the execution of so much of the judgment as imposed a fine; and the judgment removing an officer from office is self-executing, and nothing is required on the part of any official to carry it into effect; that a supersedeas is only intended to become operative as to that part of a judgment which is to

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be executed by some ministerial officer in its enforcement or collection, as by levying upon the property of the defendant, or taking his person into custody. There is a good deal to be said on both sides of this proposition; but our conclusion is that the execution of the supersedeas suspends the whole judgment until the appeal is disposed of. It is a most significant fact that the sections of the Constitution and statute under which prosecutions like this may be maintained provide that the convicted officer shall have the right of appeal to the Court of Appeals. It is, we think, manifest that this allows an appeal, not only from the judgment imposing a fine or imprisonment, but also from so much of the judgment as vacates the office. There is no express provision of the Code or statute allowing a supersedeas in proceedings of this character, nor, indeed, is there in any other case. The right to suspend a judgment by the execution of a bond pending the appeal is allowed in general terms by the Code; and with few, if any, exceptions, every judgment for the recovery of money, whether in civil or criminal proceedings, that may be appealed from may be suspended pending the appeal; the general rule being that a supersedeas does not annul the judgment, but only suspends its efficacy while it continues in force. Runyon v. Bennett, 4 Dana, 598, 29 Am. Dec. 431. This being conceded, it is said that as the judgment of ouster was self-executing, complete in itself when it was entered, requiring no other action to enforce it, the appeal bond could not annul, vacate, or set it aside; hence it did not have the effect of suspending that much of the judgment. And our attention is called to a number of authorities holding that where a judgment or decree executes itself—that is, where no act of a ministerial officer is

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necessary to put it into effect—the supersedeas does not alter the state of things created by the judgment from which the appeal is prosecuted. Elliott on Appellate Procedure, sections 392, 393; State v. Woodson, 128 Mo. 497, 31 S. W. 105; Walls v. Palmer, 64 Ind. 493; Fawcett v. Superior Court, 15 Wash. 342, 46 Pac. 389, 55 Am. St. Rep. 894; Allen v. Church, 101 Iowa, 116, 70 N. W. 127. It may be conceded that under the rule prevailing in this State as to the effect of a supersedeas that if a judgment is what may be called self-executing, requiring no process or further order of court to make it effective, there would be nothing that the supersedeas could operate upon to suspend; and hence the judgment would necessarily become at once effective, although an exception to this general rule seems to have been made in the matter of injunctions. Smith v. Western Union Tel. Co., 83 Ky. 269, 7 Ky. Law Rep. 22; Elizabethtown R. Co. v. Ashland St. Ry. Co., 92 Ky. 478, 22 S W. 855, 15 Ky. Law Rep. 258. Conceding that a judgment of court vacating an office is self-executing in the sense that no further action is needed to make it effective, nevertheless the Constitution and statute giving the officer a right to appeal to the Court of Appeals from the judgment evidently means that he shall have the right to appeal from both the judgment inflicting the fine and the judgment of ouster, and the right to stay the entire judgment pending the appeal. Indeed, it might well be said that so much of the judgment as vacates the office is merely incidental to and follows that part of the judgment imposing the fine,—as, if the officer is not fined, he cannot be removed from office; if he is fined, his removal follows as a matter of course. Again, it would be giving to the convicted officer very inadequate relief to say that he might

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appeal from the judgment vacating his office, and yet be deprived of the office by the judgment of the inferior court, although that judgment might be reversed and entirely set aside by the judgment of the appellate court. Then, too, if the judgment of ouster became at once effective upon entering the judgment in the lower court, a vacancy in the office would exist that might be at once filled by the appointing power, and if afterwards, and before the term expired, the judgment vacating the office was set aside by the appellate court, it would seem necessarily to follow that its effect would be to restore the ousted officer to his office. This would result in having two claimants for the same place, and cause unnecessary confusion and disorder in the conduct of the public business.

It is suggested that when a public official has been indicted and found guilty of a grave offense, and judgment has been pronounced depriving him of the office in the conduct of which he committed the malfeasance, he ought not thereafter to be allowed by suspending the judgment to discharge the duties of the office during an appeal; thereby defeating the course of the law that took from him the office he had disgraced. A sufficient answer to this is that, in the administration of justice, under our procedure, no judgment of an inferior tribunal can be deemed to finally adjudge the rights of the parties when the person against whom it is entered prosecutes within the time and in the manner allowed by law an appeal to a court having jurisdiction to revise it. Neither public policy nor the ends of justice would be promoted by denying to a public official the right to test the validity of a judgment against him; and it is difficult to understand upon what principle it can be

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maintained that such officer may appeal from so much of the judgment as imposes a trifling fine, fully protecting his rights by the execution of a bond, and yet be denied the more important right to save his office until the judgment of the lower court can be reviewed.

Upon the whole, we are of the opinion that the fair meaning of the constitutional provision allowing an appeal carries with it the right to suspend the judgment; and that, during the pendency of the appeal, neither the judgment imposing the fine nor vacating the office becomes effective.

Wherefore the judgment is reversed, with directions for proceedings in conformity with this opinion.

CASE 88.—ACTION BY THE WESTERN MANUFACTURING CO. AGAINST COTTON & LONG UPON A WRITTEN CONTRACT.—October 17.

Western Manufacturing Co. v. Cotton & Long

Appeal from Madison Circuit Court.

J. M. BENTON, Circuit Judge.

Judgment for defendants, plaintiff appeals—Affirmed.

1. Contracts—Validity of Assent—Fraud.—A written contract may be impeached for fraud practiced either in its execution or in its obtention.
2. Cancellation of Instruments—Fraud—Sufficiency of Evidence. —Fraud or mistake, to set aside a written contract, must be established by substantial and satisfactory proof.

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3. Contracts—Execution—Fraud.—Where a person by ostensibly reading a contract to another obtains his signature to an agreement materially different from the reading, it is a fraud which invalidates the contract.
4. Principal and Agent—Liability to Third Person—Fraud of Agent.—Where a principal accepts an order for goods obtained by an agent, it is bound by the agent's acts in obtaining it, although he violated the principal's instructions.

J. C. & D. M. CHENAULT for appellant.

1. Appellee Cotton admits that he can read and write; without the admission this court would presume him competent to contract and fully protect himself in the absence of proof to the contrary.

2. The only way to avoid the terms of the writing signed is on the grounds of fraud or mistake.

3. As to the question of fraud, it is a well settled principle throughout the country, that to show fraud, one must show that he was deceived in something, concerning which he had no means of knowledge, and that he had a right to rely upon what was told him concerning it.

AUTHORITIES CITED.

Blanchard v. Moore, 4 J. J. Marshall, 473; Reynolds v. Palmer, 21 Fed. Rep., 433; Parson on Contracts, 9 Ed., vol. 2, p. 491; Trammill v. Ashworth, 99 Va. 646, 39 S. E. 593; Short v. Pierce, 11 Utah, 29; Dalton v. Hood, 34 Pa. State, 365; Cooley on Torts, 538; Rice v. Ward, Ohio Dec.; Spencer v. King, 5 Ohio Dec., 113; Marshall v. Rech, etc., 1 Dana, 611; Moore v. Turbenill, 2 Bibb, 602.

J. TEVIS COBB for appellees.
(No brief in the record.)

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

Appellant, a manufacturer of jewelry in Minneapolis, Minn., sent its drummer into the country to make sales of its wares to retail merchants. He approached appellees, who were conducting country stores in

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Madison county, in this State, and proposed to sell them a bill of the goods. Appellees, being doubtful whether there was a market in their locality for such wares, declined to buy. The negotiations then took the form that the drummer proposed to place its jewelry with appellees for sale, to be paid for only in the event it was sold after a fair trial. To this proposition appellees assented. A printed form of contract was then filled out by the drummer, and appellees signed it without reading it. Appellee Cotton was the member of the firm with whom the contract was made, and the only member present at the negotiations. He claims that the contract was read to him by the drummer, ostensibly containing their agreement as to the terms of the sale, and that he relied on the drummer's reading of it as to its contents. It turns out that the contract signed was materially different from the reading in that it evidenced an absolute sale of the goods, with the agreement on the part of the purchasers to execute negotiable notes in payment on receipt of the consignment. Appellees refused to accept the goods or to execute the notes. Whereupon appellant brought this suit upon the written contract to recover the contract price. The defense is that the contract was obtained by the fraud of appellant's drummer, and was not, therefore, the act and deed of appellees. The case went to trial upon this issue, resulting in a judgment denying appellant any recovery on the contract.

A written contract may be impeached under the practice in this State for fraud practiced either in its execution or in its obtention. Whether the contract contains the true agreement of the parties, but was induced by the fraudulent misrepresentation of one of them, or whether it fails because of the fraud of

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a party to state truly the agreement, such as by surreptitiously substituting a false paper for the true one, or by misreading the contents of the paper, or by force or duress, its execution was procured, the party not in fault, when sued upon it, may plead the fraud as a defense in avoidance of the recovery. Or, as it was stated for the court by Chief Justice Robertson in Tribble v. Oldham, 5 J. J. Marsh., at page 142: "When by fraud or misrepresentation a written memorial of a contract essentially variant from the agreement actually made shall have been imposed on a party, the deed or writing is not his. It is not obligatory. And in such cases the fraud or misrepresentation may be proved, without contradicting the written evidence." But, when it is said that a written contract may be impeached for fraud or mistake, it does not follow that it can or ought to be overturned lightly. The presumption is in favor of the writing. He who attacks it must bear the burden; and the rule is that the fraud or mistake must be established as clearly existing by substantial and satisfactory proof. If the paper itself is plain in its statements, easily understandable, and bears on its face no evidence of the alleged fraud, it operates by law to merge all that was spoken before, leading up to its execution. All that was said then, and which is not incorporated into the document, must be regarded as abandoned or modified by the terms finally written down and signed. Such is the very purpose of written instruments. It is to make certain that which may have been indefinite, or about which a dispute might arise, depending for its settlement upon fickle memories or interested testimony. As the paper speaks for itself, cannot be misunderstood, and forgets not, the law looks with marked favor upon written documents

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as evidence, placing them in the highest category. All this would be undone if either party were still at liberty to refute the writing by his own mere word, however trustworthy he may be. No rule could more completely unsettle the law of evidence, built up so painstaking and wisely by generations of jurists and legislators.

Still, the exception to the rule against the impeachment by parol testimony of written contracts, namely, that when procured by fraud, or by mutual mistake of the parties the writing does not embrace the true agreement, the courts will set aside or reform the writing, is as important and as just in every sense as the rule itself. The error is sometimes made of supposing that a mere allegation of fraud or mistake opens the written contract, and its merits will then depend upon the preponderance of the evidence. But it should always be borne in mind that written documents, admittedly signed by the parties entered into in solemn form and with apparent deliberation—for such the writing imports—must stand, unless by strong evidence of a convincing nature the judicial mind is convinced that it was obtained by fraud, or fails because of the mutual mistake of the parties to state the true agreement. With these rules in mind, the next step is to investigate the evidence of the alleged fraud. The written contract in this case is headed in bold type, "Read this," and closes with the statement, "I have read this contract, have had delivered to me by your salesman a copy of same, and this is all of the contract between us." It is argued that these terms give strength to appellant's case, and weaken appellees'. But it must be remembered that appellee Cotton says the contract was not read by him at all, but was ostensibly read to him by appel-

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lant's agent. Unless, therefore, the statements mentioned were correctly read to appellee, their presence in the contract would constitute evidence of the attempted fraud, instead of a purpose to call attention to the contents of the instrument. Indeed, all written contracts are supposed to be read over by the parties before signing; and it is the law that the writing is the whole contract.

The quoted clauses do not help appellant's case under all the facts disclosed in the testimony. Appellant's drummer denied having made the sale on the terms claimed by appellees, but says he sold on the terms stated in the writing, and none others were discussed. On this point he is contradicted by appellee Cotton, and by another witness who was present and heard the negotiations; the latter fully sustaining Cotton's story. Then the contract itself is unusual. The manufacturers sell their wares to the retail merchant, who is to execute six notes or accepted bills of exchange, in equal installments, running through a year in payment. Then it is agreed, so the paper runs, if the merchant does not sell the goods within the year, after keeping them fairly exposed for sale in show-cases furnished by the manufacturer, the latter will buy back all the unsold goods at the original cost price. The real difference between these litigants is as to the time of payment. Appellees say no other time was agreed on or discussed than to pay for the goods after they were sold—a consignment to sell on commission. Appellees are corroborated in the testimony of Mr. Cotton by that of the witness Hagan. Hagan did not see the paper signed, but saw the parties as they went to the other end of the store, where pen and ink were kept, to sign it. He, of course, could not then hear what passed between them

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at the moment of signing. But neither the drummer nor Cotton claim that any change was made in the terms after they were first discussed, or that any different agreement was reached when they went to sign the contract. In addition, the character of goods sold, the place of appellee's business, and kind of customers he usually had, with the unusual admitted features of the sale, tend in some measure to corroborate appellees' version of the matter. Opposed to all this appellant's salesman stands alone. His bias is probably as great as Cotton's. The paper itself does not support the salesman; for we must remember it is the paper which is being tried—whether it is genuine. If it is genuine, then all this evidence is out of the case for any other purpose, as then the paper speaks for itself and the parties. But in the conflict to overturn the paper it must be stood aside until its authenticity is beyond question. The evidence is fairly convincing that the paper does not contain the true agreement. The inquiry now comes to the effect of appellees' signing the paper without reading it.

It is contended for appellant that a party cannot be deceived as to the truth who shuts his eyes and refuses to look at what is before him plainly visible. If the fact be conceded or established that one party fraudulently misread to the other the paper which was to evidence the contract between them, so as to create the impression that the document as read contained the same matter as was embraced by the understanding and agreement of the parties, his baseness is not offset in law by the mere negligence of the other party, who relied on what he had no reason to doubt. Whether the victim is actually misled is always an essential inquiry, and that the means of

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knowledge were open to him, were indeed easily available, and nothing but gross negligence would have failed to discover the falsehood, do not preclude an inquiry into the truth as to whether he in fact had the knowledge, and was in fact misled by the stratagem of his adversary. The law is not designed to protect the vigilant, or tolerably vigilant, alone, although it rather favors them, but is intended as a protection to even the foolishly credulous, as against the machinations of the designedly wicked. The true principle as to means of knowledge is well put by Mr. Pomeroy in his Equity Jurisprudence (volume 2, section 895) thus: "The mere existence of opportunities for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred. The doctrine of constructive notice does not apply when there has been such a representation of fact. If one party—a vendor, for example—claims that the invalidating effects of his misrepresentations are obviated, and that the purchaser was not misled by them, either because they were concerning patent defects in the subject-matter, or because he was from the outset acquainted with the real facts, or because he had made inquiry, and had thereby ascertained the truth, the foregoing qualification plainly applies. It is plainly incumbent on the vendor to prove the alleged knowledge of the purchaser by clear and positive evidence, and not leave it a matter of mere inference or implication. An opportunity or means of obtaining the knowledge is not enough." Or, as it was stated by this court in Trimble v. Ward, 97 Ky. 755, 17 Ky. Law Rep. 508, 31 S. W. 866: "That the representations were of a

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character to induce action, and did it, is enough; for it is not just that a man who had deceived another should be permitted to say to him: 'You ought not to have believed or trusted me,' or 'You yourself were guilty of negligence.'" Also see Pringle v. Samuel, 1 Litt. 43, 13 Am. Dec. 214; Hughes v. Robertson, 1 T. B. Mon. 215, 15 Am. Dec. 104; Morehead v. Eades, 3 Bush, 122; Bright v. Wagle, 3 Dana, 254.

None of these cases, it is true, involved the failure of the deceived party to read the instrument which he was signing. But we believe that fact is of the same kind, and different only in degree from the circumstances in the cases cited. There are many cases, and particularly old ones, in other common-law jurisdictions, where the courts have denied the defense to a party who did not read the paper which he signed. The trend of the courts is, however, toward liberalizing the defense. Fargo Gas, etc., Co. v. Fargo Gas, etc., Co., 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593, and cases cited in Eng. & Am. Encyc. of Law, 122. While there is always a sharp struggle in the courts between the desire to repress fraud upon the one-hand, and to discourage negligence and the opportunity and invitation to commit perjury by laying down the bars upon the other, the question seems to be settling down to hearing all the facts, still scrutinizing closely, and even suspiciously, the claim of a party to such an instrument that he had not read it. The fact is that very thing frequently happens. The rule of law is one of policy. Is it better to encourage negligence in the foolish, or fraud in the deceitful? Either course has most obvious dangers. But judicial experience exemplifies that the former is the least objectionable, and least hampers the administration of pure justice.

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In this case it is not disputed in the evidence that appellee Cotton did sign the contract without reading it. His testimony that he did sign it without reading is uncontradicted. It is not material whether the contract was misread to appellee, or whether, contrary to the agreement reached by the parties, it was written differently by appellant's salesman and appellee's signature obtained without his attention being called to the alteration. The act of obtaining his signature to it under either state of case was a fraud upon appellees, and ought not in justice to stand. Appellant is bound alike by what its agent said toward inducing the contract, and his conduct in obtaining it, although in doing so the agent violated the positive instructions of his principal, and acted contrary to its desire. The fruit of the agent's work cannot be accepted by the principal without taking it subject to its infirmities. Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701.

The judgment of the circuit court is affirmed.

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CASE 89.—ACTION BY CLARENCE W. PARSONS AGAINST JOSHUA B. F. BREED INVOLVING HIS RIGHT TO THE OFFICE OF CITY ENGINEER.—October 17.

Parsons v. Breed

Appeal from Jefferson Circuit Court.

C. P. Branch, (1'Div.) EMMET FIELD, Judge.

Judgment sustaining a demurrer to the petition and plaintiff appeals—Affirmed.

1. Municipal Corporations—Special Charter—Implied Repeal.—The legislation for the incorporation and government of cities of the first class, adopted pursuant to Constitution, 1891, sections 166, 167, requiring the General Assemoly to provide by general laws for the government of cities, etc., is in lieu of existing legislation on the subject, and repeals by implication a special charter given to a city of the first class.
2. Same—Officers—Public Works—Chief Engineer.—Ky. Stats., 1903, section 2810, providing that each executive board of cities of the first class may appoint a chief of each department under its control, and empowering the board of public works to appoint a chief engineer, adopted in obedience to Constitution, 1891, sections 166, 167, requiring the General Assembly to provide by general laws for the government of cities, etc., repeals the special charter of Louisville, creating the office of principal engineer, providing for the manner of filling it, and its term.
3. Same—Removal of Engineer.—The office of chief engineer is created by Ky. Stats., 1903, section 2810, empowering the board of public works in cities of the first class to appoint a chief engineer, and the officer is a chief of a department under the control of the board of public works, and removable by it without notice and without cause.
4. Officers—Tenure—Removal.—Where neither the Constitution nor the statutes fix the term of office, the appointee holds at the pleasure of the appointing power, though it attempts to fix a definite term.

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5. Municipal Corporations—Board of Public Works—Chief Engineer—Term of Office.—The board of public works of a city of the first class created by Ky. Stats., 1903, section 2824, and empowered by section 2810 to appoint a chief engineer, has no power to appoint a chief engineer for a fixed term, but he is removable at the pleasure of the board.

R. N. MILLER and THUM & CLARK for appellant.

POINTS AND AUTHORITIES.

1. C. W. Parsons was lawfully appointed chief engineer of Louisville for a term of four years.

The board of public works had power to appoint him. The Legislature had power to delegate to this board the power to so appoint him. (23 Am. & Eng. Enc., 404-5; Brown v. Holland, 97 Ky.) The Legislature did so delegate this power, which is ample. (Ky. Stats., section 2810.) The board exercised this power and appointed him on December 10, 1901, for a term of four years.

The four-year term may be supported on either of the following entirely independent grounds:

1. The act of March 3, 1870, as amended by that of March 10, 1882, fixes the term at four years beginning November, 1885 (see Burnett's Code, pp. 271 and 473), and this act was not abrogated by the mere provision for appointment in the act of February 9, 1894, amending the charter act of cities of the first class ,Act of July 1, 1893), which, on the contrary, incorporated with it the existing legislation establishing a term.

(a) There was no express repeal.

(b) There was no implied repeal.

(c) Repeals by implication are not favored. (Beatty v. Commonwealth, 91 Ky., 313; Mauget v. Plummer, 107 Ky., 41; 26 Am. & Eng. Enc. of Law, 721; Commonwealth v. Mason, 82 Ky., 256; City of Louisville v. Young, 65 S. W., 599.)

(d) Nor does a general act necessarily repeal former acts within its possible scope. There is no such repeal when the subject of the earlier act is left out entirely, as it was here in the charter act, nor when no attempt is made to provide completely therefor. (Mauget v. Plummer, Sheriff, 107 Ky., 41; Commonwealth of Ky. v. Grinstead & Tinsley, 108 Ky., 59; Pearce v. Mason Co., 99 Ky., 357; Constitution, section 1 of syllabus; Newman v. Ecton, 14 Ky. Law Rep., 793; Isenberg v. Selvage, 103 Ky., 260; Brown v. Holland, 97 Ky., 249; Sales v. Barber Asphalt Paving Co., 66 S. W., 979.)

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(e) Such an act as that of February 9, 1894, is regularly construed as relating to the previously established term. (Mechem on Public Officers, 385, 120 citing Speed v. Crawford, 3 Met., 207; 23 Am. & Eng. Ency. of Law, 404; 13 id., 409-10; Hoke v. Richie, 100 Ky., 66; State v. Hyde, 121 Ind., 20, in addition to the cases cited above.

(f) Even if there had been an intention to create an office for good behavior, the courts will construe such an act, in order that it may not be unconstitutional, to mean a term of years. (Constitution, section 23; Newmeyer v. Krakel, 23 Ky. Law Rep., 190; 62 S. W., 523.)

(h) There was a vacancy. (Mechem, section 124.) Parsons had aready been holding four years and there had been no appointment but the one he claims under during that time; a four-year term must have expired sometime during this four years, leaving Parsons as hold-over officer, and a vacancy to be filled.

(i) The constitutional provision made this term, as well as that of other offices, end in November, 1893, which would leave the office vacant with the last of November, 1901; also if the term be deemed to have started December 10, 1897, there would equally be a vacancy on December 10, 1901. (See also, Commissioners v. George, 47 S. W. 779, 104 Ky.; McArthur v. Nelson, 81 Ky., 67; Hoke v. Richie, 100 Ky., 6; 23 Am. & Eng. Ency. of Law, 411 McGee v. Gill, 79 Ky., 106; Wheeler v. Commonwealth, 98 Ky., 59; Mechem on Public Officers, section 113: Mechem on Public Officers, sections 125 to 128; 23 Am. & Eng. Ency. of Law, 417; People v. Randell, 151 N. Y., 497; Hopkins v. Swift, 100 Ky., 14; People v. Opel, 188 Ill., 194; Mechem on Public Officers, sections 127 to 132; 108 Tenn., 82.)

(j) There was no vacancy on December 18, 1901, when the attempt was made to appoint J. B. F. Breed, the office having been filled. (Mechem on Public Officers, section 113; State v. Starr, 67 Atl., 512, 78 Conn., 636.)

(k) Even if the provisions enacted prior to the passing of the amendment of February 9, 1894, had been done away with by said act (and we maintain there is no real basis for contending that they were) the Legislature has by conferring the power of appointment, delegated to the board of public works the power to fix the term. (23 Am. & Eng. Ency. of Law, 405, citing State v. Williford, 104 Tenn., 695; State v. Manlove, 33 Tex., 798; see also, 3 Ill., 79; Lahar v. Eldridge, 77 N. E., 635; 190 Mass., 504.)

(l) They have done so under this power, and made an appointment at a time when, as shown before, there was a vacancy.

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2. There was no power to remove the chief engineer at will. Section 2810 conferred no such power expressly and no such power is implied in the power to appoint.

1) No power to remove was given by the original act of 1893.

(2) No power was given by the amendment of February 9, 1894.

(a) See the act and preamble. (Acts, 1894, p. 9, the preamble not being contained in the Ky. Stats.) No need would have existed for this enactment if the chief engineer had been a chief of a department and removable at will.

(b) The implication of the language in these acts negatives a power of removal in this board.

(c) The city engineer is a municipal officer of independent powers and not a mere employe of the board of public works.

(d) No power of removal is implied by law from the power of appointment, because a method of removal is expressly provided by statute. (Ky. Stats., section 2781; Mechem on Public Officers, section 446.)

(e)Nor can a term officer be removed without cause, unless power is expressly given. (Todd v. Dunlap, 99 Ky., 449; Commonwealth v. Arnold, 3 Lit., 309; 23 Am. & Eng. Ency. of Law, 437.) The chief engineer is undeniably a municipal officer. (Wilson v. City of Louisville, 99 Ky., 698; Lowry v. City of Lexington, 113 Ky., 763.)

(f) There is no public policy which prevents an outgoing board from appointing an officer whose term extends into the term of a succeeding board, provided there is a bona fide vacancy and a term to be filled, and provided the act of the outgoing board is not an anticipation of a non-existing vacancy which would fall in during the term of the succeeding board.

(g) It is the duty of the board to fill a vacancy which actually occurs during its term, and this record shows that the course adopted with respect to this office has been for the outgoing board to appoint the next chief engineer for a term of four years, the policy of the law appearing to be to make said office independent as to term. (Anderson v. City of Camden, 55 N. J. L., 515; State v. Lane, 51 N. J. L., 275.)

KOHN, BAIRD, SLOSS & KOHN for appellee.

POINTS AND AUTHORITIES.

1. The chief engineer of the city of Louisville is neither a constitutional nor an elective officer, nor is his term fixed by law. By the act creating the position he is removable at pleasure. (Constitution, section 160; Ky. Stats., 2810.)

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(a) The power of removal is incident to the power of appointment when no fixed term is provided. (Mechem on Public Officers, 445, 454; Johnson v. Ginn., 20 Ky. Law Rep., 1475; Campbell Co. v. Trapp, 23 Ky. Law Rep., 2356.)

(b) The statute authorizes his removal at pleasure. (Board of Council of Frankfort v. Brauner, 100 Ky., 66; Tennessee Paving Co. v. Barker, 22 Ky. Law Rep., 1069; Riffe v. Tinley, 103 Ky., 631; Lexington v. Rennick, 105 Ky., 779; London v. The City of Franklin, 118 Ky., 105; Mechem on Public Officers, p. 387; Rogers v. Congleton, 27 Ky. Law Rep., 109.)

2. The act of 1882 on the subject of the city engineer was part of the old charter. By section 166 of the Constitution it was repealed upon the adoption of the new charter in 1893, and would have been repealed in any event and without any new legislation on the 1st of January, 1895. (Board of Park Commissioners v. DuPont, 110 Ky., 743.)

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

The statute providing for and regulating the government of cities of the first class contains the following (section 2810, Ky. St. 1903): "Each of said boards may appoint and, at pleasure, remove a chief of each department under its control. The board of public works shall have the power to appoint a chief engineer for the city and such subordinate engineers as may be necessary; provided, that all applicants for the position of chief engineer shall first be examined by a board of three competent civil engineers, to be elected by the general council, and that no applicant who fails to pass an examination satisfactory to said board of examiners shall be eligible to the office of chief engineer, and no person shall hold the position of chief engineer until he shall have first passed said examination. In all cases where the examination is made in writing, all the papers shall be filed of public record with the secretary of the board of public works. The general council shall

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have the power to fix the compensation of the said board of examiners; provided, further, that no person employed in the capacity of civil engineer, deputy, or any other capacity, under the board of public works, or in the capacity of civil engineer under the employment of the city government, except the chief engineer above provided for, shall receive a salary in excess of one thousand five hundred dollars per annum. Subordinate officers and employes may be removed or punished by the board on the recommendation of the chief of the department concerned for cause, subject to such regulations as may be prescribed by ordinance or by the board. The cause for the removal of any subordinate as aforesaid must be stated in writing, and be transmitted to the board, and the board may, in its discretion, retain or dismiss such subordinate. No officer or employe shall be removed for political causes. Interference in elections, electioneering or canvassing by any officer or employe of said board shall be cause for instant removal." This statute became a law July 1, 1893, at the first session of the Legislature after the adoption of the present Constitution, except that part of the section quoted relating to the chief engineer and his assistants. That was added by an amendment, re-enacting the section as now printed, in 1894. Prior to the present Constitution, Louisville, as well as all other cities, was governed by charters specially granted by the Legislature. There had existed for many years an office in Louisville known as principal engineer, the duties of which were substantially the same as now performed by the chief engineer. By the act of March 10, 1882, the term of the office was made four years and the official elected by the council. The contention of appellant in this case is that the act

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of 1894, amending Kentucky Statutes, 2810, supra, recognized the continued existence of the office of chief engineer, and provided a different method of filling it. The Constitution of 1891 contains a radical change in our system of municipal governments. They are now well governed by general laws, applicable uniformly to all cities of the same class. Section 166 of the Constitution provides that all acts of incorporation of cities and towns theretofore created, and all amendments thereto, shall continue in force until such times as the General Assembly shall provide by general laws for their government, but not longer than four years after January 1, 1891, within which time the General Assembly was required to provide by general laws for the government of towns and cities and the officers thereof, except as provided in section 167. By the latter section all city and town officers were to be elected or appointed until the general election in November, 1893, and until their successors were qualified, at which time their terms should expire, and that at that election, and thereafter as their terms expired, all officers required to be elected by the Constitution, or by general laws conforming to it, were to be elected in November, excepting certain police judges. It was in pursuance to this mandate of the Constitution that the general law of 1893 and its amendments governing cities of the first class were passed. The system adopted by that legislation was new, complete, and in many instances materially, if not radically, different from the special charters previously governing Louisville, the only city of its class. The manifest purpose of the Convention was to begin anew the municipal governments of the Cities of the Commonwealth, to abrogate all special legislation as speedily as possible, and cer-

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tainly within four years, that had been passed to govern them. The new legislation was not only required by the Constitution to be, but was designated by the Legislature to be, in lieu of all that had theretofore existed on the subject, by every implication repealing the old charters in all their features. Nor was it necessary to specifically enumerate all the matters repealed. The old system was repealed ipso facto, by the general new legislation adopted on the subject of charters of cities of the first class, in obedience to the constitutional mandate. Board of Park Commissioners v. Du Pont, 110 Ky. 743, 20 Ky. Law Rep. 106, 62 S. W. 891. This repeal included the statute creating the office of principal engineer, the manner of its being filled, and its term.

The new charter of cities of the first class (Acts 1893) provided a board of public works, composed of three members (section 2824, Ky. Stats. 1903), who had exclusive control over the construction and maintenance of public ways, sewers, lighting, and public buildings. Other boards are provided for the administration of other departments. Prior to 1901 the board of public works had appointed appellant as chief engineer; the appointment having been made under section 2810, supra. A new administration was elected in 1901. The new mayor appointed a new board of public works; but before it was inducted into office the old board by resolution elected appellant to the office of chief engineer of the city for a term of four years. The new board when it came into office a few days later removed appellant without notice, cause, or trial, and elected appellee to the office. This suit resulted. It was brought by appellant, claiming that he was the legal incumbent of the office, and charging that appellee was illegally setting up claim

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to it, and hindering appellant in the discharge of his official duties. A demurrer was sustained to his petiton, and it was dismissed.

The question for decision is the power of the board of public works to remove appellant, as was done. We are of opinion that the office of chief engineer was created by the amended section 2810, Ky. Stats. 1903, and he was "a chief of a department" under control of the board appointing him. His term of office was not fixed, but, as expressed in the statute, was at the pleasure of the appointing board. He was liable to removal at any time, without notice, and without cause, other than the pleasure of the board. Mechem on Public Officers, 445, 454, states the rule of law, as frequently applied by this court, as follows: "Where the tenure of the office is not fixed by law, and no other provision is made for removal, either by Constitution or by statute, it is said to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. * * *" And: "In those cases in which the office is held at the pleasure of the appointing power, and where the power of removal is exercisable at its mere discretion, it is well settled that the officer may be removed without notice or hearing." Johnson v. Ginn & Co., 105 Ky. 654, 20 Ky. Law Rep. 1475, 49 S. W. 470; Tennessee Paving Co. v. Barker, 119 Ky. 654, 59 S. W. 755, 22 Ky. Law Rep. 1069; Campbell County v. Trapp, 113 Ky. 119, 67 S. W. 369, 23 Ky. Law Rep. 2356; Board of Council of Frankfort v. Brawner, 100 Ky. 166, 37 S. W. 950, 38 S. W. 497, 18 Ky. Law Rep. 684; Riffe v. Tinley, 103 Ky. 631, 45 S. W. 1046; London v. City of Franklin, 118 Ky. 105, 23 Ky. Law Rep. 2306, 80 S. W. 514. The rule is different where the officer is one provided for by the Constitution,

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or who had a fixed term of office. Todd v. Dunlap, 99 Ky. 449, 36 S. W. 541, 18 Ky. Law Rep. 329. But, where neither the Constitution nor statute fixes the term of office, the appointee holds at the pleasure of the appointing power, although it was attempted by the apppointing power to fix a definite term. Johnson v. Cavanah, 54 S. W. 853, 21 Ky. Law Rep. 1246. The matter of municipal government is becoming more a matter of business, and is conducted more upon business methods than of statecraft. Public administrative boards are taking the places of legislative bodies in many matters, and agents or employes are used, instead of officials having rights above the public whom they are chosen to serve. The administration of the business of a city government would be materially hampered if an outgoing administration could fill all the positions provided for administering the government with persons not in accord with, and not directly answerable to, the responsible head of the new administration. For this reason, based upon public policy, the strained construction contended for by appellant ought to be denied, even if the law were not as plainly against his contention as we think it is.

We agree with the circuit court that the resolution of the old board electing appellant for a term of four years was void as far as it attempted to fix a term; and that he was removable at the pleasure of the board, without notice, cause, or trial.

Judgment affirmed.

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CASE 90.—ACTION BY MARY E. CARRITHERS AND OTHERS AGAINST THE CITY OF SHELBYVILLE TO ENJOIN IT FROM A PROCEEDING TO EXTEND ITS BOUNDARY OVER THEIR LAND.—October 23.

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137 489

Carrithers, etc., v. City of Shelbyville

Appeal from Shelby Circuit Court.

R. F. PEAKE, Circuit Judge.

Judgment for defendant, plaintiffs appeal. Affirmed.

1. Constitutional Law—Equal Protection of the Laws.—A woman is a person, and so is a corporation, within the contemplation of section 1 of the fourteenth amendment to the Federal Constitution, and entitled to the equal protection of the laws.
2. Statutes—Enactment—Assent of People Affected.—Unless the Constitution so requires, no legislative act is dependent for its validity on the assent of the people whom it affects.
3. Municipal Corporations—Annexation of New Territory.—The creation of or annexation of new territory to a town is a matter within the sole discretion of the Legislature, and does not in any manner depend on the will of a majority or any of the inhabitants living within the territory.
4. Same.—The act of incorporating towns and enlarging or restricting their boundaries is legislative and political, and in its exercise of discretion in such matters the Legislature has plenary power.
5. Constitutional Law—Municipal Corporations—Enlargement of Territory—Equal Protection of the Laws.—Ky. Stats., 1903, section 3483, provides that whenever it shall be deemed desirable to annex any territory to a city of the fourth class, or to reduce the boundaries thereof, the board of council shall by ordinance accurately define the boundary of the territory proposed to be annexed or stricken off, that the ordinance shall be published or posted, etc., and also provides for a protest by resident voters of the territory to be affected. Held, That the statute was not violative of the

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fourteenth amendment to section 1 of the Constitution of the United States by reason of the fact that some of the landholders affected might be women or corporations.

J. C. BECKHAM & SON for appellants.

The question involved in this record is whether section 3483 of the Kentucky Statutes is or is not in conflict with section 1, article 14, of the amendments to the Constitution of the United States, in that it denies to these appellants, all of whom are persons and citizens, but none of whom are voters, the equal protection of the laws and in that it abridges their privileges and immunities, and in that it deprives them of their property without due process of law.

AUTHORITIES CITED.

Yick Wo. v. Hopkins, 118 U. S. Supreme Court Reports, p. 356; Barbier v. Connolly, 113 U. S. Supreme Court Reports, p. 27, and Soon Hing v. Crowley, 113 U. S. Supreme Court Reports, p. 703; San Mateo case, 13 Fed. Rep., 722; Santa Clara Co. v. Southern Pacific Railroad, 18 Fed. Rep., 385; Boyd v. Frankfort, 25 Ky. Law Rep. 1315.

P. J. BEARD for appellee.

There is nothing before this court but a moot court case, the simple question as to whether section 3483 is constitutional or not; and the determination of this question can not affect the status or rights of either appellants or appellee. There are no proceedings pending in the case of the city to be enjoined, nor could the determination of this question, set aside or affect the judgment entered in the action of the city. We think this position comes directly within the rule laid down by this court in the following cases:

Finley v. Smith, County Clerk, 28 Ky. Law Rep., 564.

King v. Tilford, 24 Ky. Law Rep., 1270.

Conn v. Desha, 24 Ky. Law Rep., 1400.

"A reversal now would accomplish nothing; an affirmance would benefit nobody. The rule is that where pending an appeal an event occurs which of necessity renders any judgment which might be pronounced ineffectual, the appeal will be dismissed."

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AUTHORITIES.

Section 3483, Ky. Stats., 1903 edition; section 3483, Ky. Stats., 1899 edition; Finley v. Smith, 28 Ky. Law Rep., 564; King v. Tilford, 24 Ky. Law Rep., 1270; Conn v. Desha, 24 Ky. Law Rep., 1400; Gaskin, etc., v. City of Georgetown, 26 Ky. Law Rep., 89; City of Lebanon v. Creel, 22 Ky. Law Rep., 865; Guenther & Bro .v. American Steel & Hoop Co., 25 Ky. Law Rep., 795; Am. & Eng. Ency. of Law, vol. 10, 289.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

The city of Shelbyville, one of the old cities of this State, is a city of the fourth class, thrifty and growing. It proposed by proceedings conforming to section 3483, Ky. Stats. 1903, to enlarge its territory by including within the corporate limits of the city a certain boundary which embraces real property owned by appellants and others; some of the latter being voters. This suit was filed in the circuit court to enjoin the city from proceeding in the matter upon the ground that the statute violates section 1 of the fourteenth amendment to the Constitution of the United States, and is therefore void. The appellants are all women. They, with certain corporations who joined as plaintiffs in the suit in the lower court, own unimproved lands within the territory proposed to be annexed to the city, and which was not within any city or town when the proceedings were begun. The complaint is that to take the lands of appellants into the city will add a burden of municipal taxation without benefit; and that, as the statute regulating the procedure for adding to the boundaries of a city discriminates against women and all other persons affected who are not voters, they are not afforded equal protection of the laws, inasmuch as the statute pro-

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vides that voters only may make defense to the proceedings, if there are voters in the territory to be affected. A demurrer to the petition was sustained, and the plaintiff's prayer for relief was denied by the circuit court.

For the more convenient study of the subject, the existing statute, which is the authority for the city's procedure and the subject of appellant's complaint, is set forth at length as follows: "The boundaries of cities of the fourth class shall, until changed as herein provided, remain as now established by law. Whenever it shall be deemed desirable to annex any territory to a city in this class, or to reduce the boundaries thereof, the same may be done in the following manner: The board of council of such city shall, by ordinance, accurately define the boundary of the territory proposed to be annexed or stricken off. Such ordinance shall be published for not less than three weeks in a newspaper in such city or county; if there be no newspaper published in the city or county, the ordinance shall be advertised by handbills, to be posted for at least fifteen days at four or more public places in the city, and at the same number of the most public places within the territory proposed to be annexed or stricken off. Within thirty days after the adoption, publication and advertisement of such ordinance, a petition shall be filed in the circuit court of the county within which said city may be situated, in the name and on behalf of the city, setting forth the passage, publication and advertisement of such ordinance, the object and purposes thereof, together with an accurate description by metes and bounds of the territory proposed to be annexed to or stricken from the city, and praying for a judgment of the court to annex said territory to or strike same from

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the city, as the object may be. The said petition shall be filed not less than twenty days before the first day of the next succeeding term of the circuit court in that county. Notice of the filing of the same shall be given in the same manner as provided herein for notice of the passage of said ordinance. If no defense be made at the first term of the court after the filing of said petition and notice of same as herein provided and the court shall make no order for granting further time for making defense the court shall render a judgment annexing or striking off the proposed territory as the objects of the proceedings may be. But at the first term of the circuit court or within the time fixed by the court by its order any one or more of the resident voters of the territory proposed to be annexed or stricken off may file a defense in said proceedings setting forth the reasons why such territory, or any part thereof, should not be annexed to the city, or why the limits of the city should not be reduced. The case shall be tried by the court without the intervention of a jury. If the court, upon hearing, be satisfied that less than a majority of the resident voters of the territory sought to be annexed or stricken off have remonstrated against the proposed extension or reduction, and that the proposed extension or reduction of the limits of the city, as the case may be, will be for the interest of the city, and will cause no material injury to the owners of real estate in the limits of the proposed extension or reduction, it shall so find, and the proposed extension or reduction shall be decreed or adjudged. But if the court shall find that a majority or more of the resident voters in the territory to be affected or the owner or owners of said property, if there be no resident voters, remonstrated against such change, and that

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said change will cause material injury to the owners of real estate in the limits of the proposed extension or reduction, it shall so find, and said extension or reduction shall be denied. If the judgment of the court is adverse to the proposed change, no further effort to annex or strike off the territory so proposed shall be made within two years after the entering of the judgment. Costs shall follow the judgment, and no appeal shall lie from the judgment of the circuit court. If the judgment in such proceedings be in favor of the city, it shall be certified by the clerk of the court to the board of council and entered on the records of the board, and the board shall thereupon, by ordinance, annex to or strike from the city the territory described in the judgment: Provided, the circuit court shall not have jurisdiction of such proceedings, unless the required publication or advertisement of the ordinance proposing the extension or reduction of the limits of the city contains notice of the proposed proceedings in such court, proof of which publication, or advertisement may be made by affidavit filed in the proceedings: Provided, however, that the provisions of this act shall not be construed as interfering with the rights of any litigant in or growing out of any action now pending in any court of this Commonwealth under the act to which this is an amendment." This section is the statute amended as of March 22, 1902. Before that amendment other features existed which have been eliminated. The precise question here presented has not heretofore come before this court, nor, so far as we have been able to find, before any other court for decision. Certain features of the question have been passed upon by this and other supreme courts, which will be noticed in the course of the opinion.

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Of course, a woman is a person, and so is a corporation (Santa Clara County v. Southern Pacific R. Co. (C. C.) 18 Fed. 385), within the contemplation of the fourteenth amendment to the federal Constitution. If either is denied the equal protection of the law by following the statutory proceeding for annexing territory to a city, then the statute must be declared invalid. A very brief study of the nature of our municipal corporations will materially aid in the determination of the question presented. Our system of city government is adopted from the English, which was probably fashioned upon the Teutonic town. In both the former the will and welfare of the landowner were consulted. Indeed, the Teuton ceroil and the English burgher were deemed the sole beneficiaries of the municipal privileges. Green's Short Hist. Eng. People, section 1, p. 3. After the Conquest, king and the nobility overbore the simple freedom of the towns, and sold it back to the inhabitants in consideration of revenues paid into the royal treasury. The liberties, or privileges so ceded to the body of the burghers, were evidenced by a grant in the nature of a charter, whence was derived the corporate charter of the grantee, the collective citizens as a town. The original idea seems to have been just the reverse of that obtaining at this day. Then the towns were supposed to be conducted for the personal benefit of its citizens only, while now it is an arm of the state government, governing in its name, and by its authority solely, for the benefit of the state. Naturally enough no town was then set up as a corporation involuntarily, or save by the request of the inhabitants concerned. Acceptance was therefore essential to make operative a charter granted by the king. 1 Kyd. Corp. 61. He had no

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power to impose political obligations on any person or community, except in the form of conditions, nor to compel the acceptance of any charter. President, etc., v. Society, etc., 24 N. J. Law, 385. When Parliament became supreme, and usurped in a sense the prerogatives of the crown in the creation of municipal corporations, it, in legislating for the public, granted charters to towns and cities at its pleasure. No assent of the inhabitants was necessary in that case; for the charter of a corporation created by Parliament was an act of Parliament, and no assent is requisite to make an act of Parliament operative. But even Parliament has been generally considerate of the will of the inhabitants upon whom the charters were to operate, and a provision was nearly always made for their assent in some form or other. The recent English statutes providing general laws for local government of towns and cities so require. 1 Dill. Munic. Corp. section 34; Municipal Corporation Act of 1882. As this country was settled by Englishmen, who brought over the customs and laws of the mother country, it was to be expected that substantially the same system of town government was instituted over here. After the Revolution, the sovereignty of the king and Parliament was lodged in the state. Thereafter it granted charters to the towns, not as privileges conferred by favor or for price, but as a part of a system conserving the principles of liberty as found in self-government. What was said by Mr. Justice Brown in People v. Draper, 15 N. Y. 532, can as well be applied to the conditions in Kentucky: "When the present Constitution was formed, the entire territory of the State was separated and appropriated by its civil divisions, its counties, cities, and towns. These civil divisions

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are coeval with the government. The State never existed a moment without them. All our thoughts and notions of civil government are associated with counties, cities, and towns. They are permanent elements in the name of the government. They are institutions of the State, durable and indestructable by any power less than that which gave being to the original law. They are, however, subject to control and regulation by the Legislature. It may enlarge or circumscribe their territorial limits, increase or diminish their members, separate them into parts, and annex some of the parts to others; but they must still assume the form and be known and governed only as counties, cities, and towns. The State at large is and ever has been an aggregate of these local bodies." Thus we see that the creation of a municipal corporation is always and essentially a political act. Whether it will be done or not depends solely on the judgment and will of the political department of the government, the Legislature. And no legislative act, unless the Constitution so requires, is dependent for its validity upon the assent of the people whom it affects.

The first three Constitutions of this State made no reference to the incorporation of towns and cities. That was done by the Legislature as an incident of the powers of the sovereign state lodged in its political department. Charters were then granted to cities and towns by special act of the Legislature, as anciently was done by special act of Parliament. The Legislature judged of the necessity and propriety of the act. It considered each separate case on its merits, and gave to the municipality such territory and such form of government as was deemed proper, and changed each at will. The Convention

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of 1891, which framed the present Constitution, determined to have an end to all special legislation. Its evils, not necessary to recount here, had provoked the people. Special legislation was inexorably prohibited respecting all subjects where a general law could apply, and particularly as to the creation of cities and towns and their government. Sections 59-159, Const. The Legislature was required to classify all the towns and cities of the Commonwealth, and to enact general laws for their government. The Legislature did so classify the cities and towns, and has provided for their government by general laws. The section of the statute under consideration is part of the general laws for the government of cities of the fourth class. It could never have been contemplated that the cities and towns were to forever remain in size territorially as the Constitution found and left them. That they would grow in time, and would necessarily require new territory to accommodate their expansion, was known. In the enactment of the general laws, this feature of the situation must of necessity have been presented to the minds of the Legislature. Inasmuch as no two cities or towns, much less all of a class, would probably grow at the same rate, or require even equal territory at the same time, and as special acts could not be now passed to meet the exigency of each case as it arose, some plan open to all, and flexible enough to accommodate the particular needs of each town and city, must be provided by general law. It would scarcely be safe to leave the matter to the sole discretion of the municipal legislative boards (as is done in certain class cities in Missouri, it seems). So, after fixing the general conditions upon which the Legislature was willing to grant an extension of the corporate boundary

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(or to restrict it as the case might be), some tribunal must be selected or created to whom should be confided the responsibility of determining for the Legislature whether the general conditions it had imposed had been complied with. Kentucky is not the pioneer in either its plan of generalizing the incorporation of municipalities or of relegating some essential fact in the process of incorporation, to some tribunal other than the Legislature, for ascertainment. Nearly all the states now prohibit special legislation, and require the incorporation of municipalities to be by general laws. In some of the states the question of annexation is left to a vote of the territory to be affected, as, for example, in Illinois (Village of N. Springfield v. City of Springfield, 140 Ill. 165, 29 N. E. 849), in Texas (Graham v. City of Greenville, 67 Tex. 62, 2 S. W. 742; State v. Waxahachie, 81 Tex. 626, 17 S. W. 348), and in Arkansas (Vogel v. Little Rock, 55 Ark. 609, 19 S. W. 13). Still others leave the ascertainment of certain facts to the courts of general original jurisdiction in the county wherein the town is situated. It is so in Nebraska (Gottschalk v. Becher, 32 Neb. 653, 49 N. W. 715), and in Pennsylvania (Appeal of Brinton, 142 Pa. 511, 21 Atl. 978), and in Iowa (Ford v. Town of North Des Moines, 80 Iowa, 626, 45 N. W. 1031), and in Kansas (Hurla v. City of Kansas City, 46 Kan. 738, 27 Pac. 143). In some of these cases the question was raised that it was incompetent for the Legislature to so delegate its powers, but the courts held, though not with entire unanimity, that it was not a delegation of the powers. In this State that question was presented in Clarke v. Rogers, 81 Ky. 43, 4 Ky. Law Rep. 929. The Legislature had enacted a new charter for Flemingsburg, but provided that it should become effective only

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upon its acceptance by a majority of the legal voters of the town. In the suit involving the constitutionality of the provision, the court observed that, while the Legislature had the right to substitute the new charter for the old without consulting the popular will on the subject, yet it could legally submit the charter to the people directly concerned. It was said: "The Legislature cannot delegate its power to make laws, but when enacted whether or not the law shall become operative may be made to depend on the popular will"—citing Cooley, Const. Lim. pp. 143-230. Why may it not be made to depend as well upon any other fact? And why may it not delegate to some ministerial or judicial officer the duty of ascertaining the existence of the requisite fact? In the existing statute it is to be observed that the popular will is to be consulted, and to be given weight, as well as the fact whether the benefits and burthens equitably justify the proposed extension or restriction. No other tribunal is so well equipped to develop the facts, and to ascertain the conditions named by the Legislature as those upon which its grant shall take effect, as are the courts. The questions are quasi judicial, but are not matters that ever were litigable in any court as a matter of right. In truth, the court in the particular proceeding is not in any sense dealing with the legal rights of persons who live or own property in the affected territory; for, as was held by this court in Cheaney v. Hooser, 9 B. Mon. 330, the creation of or annexation of new territory to a town is a matter within the sole discretion of the Legislature, and does not in any manner depend upon the will of a majority or any of the inhabitants living within the territory. If the Legislature does consult their wishes, as it well

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may, it acts for its own advice and guidance, and not in deference to any legal right of the citizen.

The question of benefits and burthens in the proposed annexation cannot be said to involve a justiciable right of the individual taxpayer. But it is unquestionably a proper subject of consideration in determining whether the municipal territory be extended or reduced. It is impossible now for the Legislature to pass upon each proposed annexation or diminution of territory. Either a hard and fast rule, certain to bear onerously in many instances, must be adopted by general law, or by general law the ascertainment of the fact whether the benefits and burdens are counterpoised, must be found to exist by some other tribunal. We are unable to perceive a distinction between the ascertainment of that fact by the court and the ascertainment of the majority of the voters' wills by a ministerial officer appointed to hold an election, as Cooley says may be done. Cooley, Const. Lim. pp. 143-230. The Legislature is prohibited from granting incorporating charters of any kind by special laws. All incorporations in this State, private as well as municipal, are now required to be by general laws. Yet private corporations are granted charters by specially selected tribunals upon the ascertainment by them of certain requisite facts. No one supposes now that that is a delegation of legislative authority. Nor does it confer legislative power upon the courts. Many acts of government are so complex as to partake of some or all the features of the three—legislative, executive, and judicial. Yet there are certain controlling marks by which each act is relegated to its own department. It is not infrequent that an act of the Legislature is not effective until and unless some other department

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set it in operation upon its ascertainment of a precedent condition submitted to it by the Legislature. But the finding of the fact is not legislation. Nor is it necessarily judicial, although it may be such as not to fall entirely without the legitimate domain of a judicial forum. A certain test of the act required of the circuit court under the statute in hand is: Could it have been done by any other department of government, without invading the prerogative of the judiciary? Undoubtedly it is such an act as the Legislature has always exercised jurisdiction over. We have seen it is such also as may be settled by a vote taken under executive supervision, if the Legislature so provide. From whatever point it is viewed, the subject returns to this: The act of incorporating towns, and enlarging or restricting their boundaries, is legislative and political. In its exercise of discretion in such matters the Legislature has plenary power. It is no infringement of any constitutional right of any person that he is not first consulted before the power is exercised, or if it is allowed to be exercised upon the petition or with the consent of a selected class, as for example voters or property holders. One illustration, of everyday occurrence, is selected. Street improvements are deemed legislative matters in the first instance; yet the executive performs them in part, and the courts in part—the latter, in correcting errors of the council or of the executive department, after the work has been done and accepted, although such errors pertain solely to matters of legislation or executive act. Finally, the imposition of taxes for municipal purposes, as well as the annexation of territory to the town, is a political matter. Frequently the Legislature submits such matters to the voters. If it does, a majority fastens

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the tax upon all, the unwilling as well as those who had no voice in the election, such as women, infants, and corporations, and those not voting. In no event is it a taking of private property for public use, as that term is used in the Constitution. Cheaney v. Hooser, supra. As the Legislature might have had the condition upon which the additional territory was to be incorporated into the city to be ascertained without the right of anybody to be heard in court, or even by a vote of qualified male voters, appellants are not denied the equal protection of the laws because they were not admitted to defend the proceeding in the court.

The judgment of the circuit court is affirmed.

CASE 91.—ACTION BETWEEN ELLEN McCOY'S ADMINISTRATOR AND WILLIAM H. McCOY, AS TO A GIFT INTER VIVOS OR CAUSA MORTIS OF A BANK DEPOSIT BY THE DELIVERY OF THE BANK PASS-BOOK.—October 23.

McCoy's Admr. v. McCoy

Appeal from Kenton Circuit Court.

M. L. HARBESON, Circuit Judge.

From the judgment the administrator appeals—Affirmed.

1. Gift—Inter Vivos—Requisites.—In a gift inter vivos the donor must not only part with possession of the property, but with dominion over it; it being unconditional and irrevocable.
2. Same—Causa Mortis.—A gift causa mortis is one by a sick person, who, apprehending his dissolution, delivers or causes to be delivered to another the possession of any personal

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goods to keep as his own in case of the donor's death, and it only takes effect in case the donor dies, being conditional and revocable by the donor at any time.

3. Same—Delivery—Evidence.—Evidence that decedent told defendant to go to the cupboard and get a bank pass-book that was there, and that on his bringing it she handed it back to him, saying, "This is yours," requesting him to pay her debts and not squander it, contained all the elements necessary to show a complete delivery, whether it was treated as a gift inter vivos or causa mortis.

4. Same—Subject of Gift—Money in Bank.—There may be a gift of money on deposit in a bank by the delivery of the pass-book, whether it be a savings bank or an ordinary deposit bank.

5. Same—Evidence.—On the issue as to whether or not there was a gift of money on deposit in a bank, evidence that previous to the gift the donor had expressed an intention to leave the property to the donee was admissible.

6. Appeal—Review—Questions of Fact—Conflicting Evidence.—Where the testimony is conflicting, it is the province of the jury to weigh and determine its sufficiency.

E. J. BRITTING and ORLANDO P. SCHMIDT attorneys for appellant.

POINTS AND AUTHORITIES.

1. Gifts causa mortis are not favored in Kentucky. (Albro v. Albro, 65 S. W., 592.)

2. It was error in the lower court to submit a part only of the issues to the jury and to itself preadjudge another part. (Am. & Eng. Ency. of Law (2 Ed.), vol. 14, p. 1054; Knott's Adm'r v. Hogan, 4 Met., 99; Waldon's Adm'r v. Dixon, 5 T. B. Mon., 170.)

3. The court erred in admitting and excluding testimony. (Hill's Gaurdian v. Hill, 29 Ky. Law Rep., 201; Bailey v. Barclay, 22 Ky. Law Rep., 1244.)

4. The grandchildren of decedent, although residuary distributees, were competent witnesses for her. (Swinebroad v. Bright, 24 Ky. Law Rep., 2253.)

5. The delivery of the pass-book did not pass title to the fund deposited in the trust company. (Ashbrook v. Ryan, 2 Bush, 228; Headly v. Kirby, 18 Pa. St., 326; Redfield on Wills, vol. 3, p. 344; 14 Am. & Eng. Ency. of Law (2 Ed.), p. 1030.)

ROBERT C. SIMMONS for appellee.

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POINTS AND AUTHORITIES.

1. The gift of a deposit in a savings bank may be consummated by the delivery of a bank pass-book. (Jones' Adm'r v. Moore, 102 Ky., 591; Stephenson's Adm'r v. King, 81 Ky., 433; Pierce v. Boston Savings Bank, 129 Mass., 425; Tillinghast Adm'r v. Wheaton Ex'r, 8 R. I., 536; Hill v. Stevenson, 63 Me., 364; Redden v. Thrall, etc., 125 N. Y., 572.

OPINION OF THE COURT BY JUDGE CARROLL—Affirming.

The principal question involved in this controversy is whether or not a deposit in a bank may be the subject of a gift inter vivos or causa mortis by the delivery of the pass book of the depositor. In the petition it is alleged that three days before her demise, and while under the apprehension of death, Ellen McCoy, the mother of appellee, William H. McCoy, delivered to him a deposit book of a savings bank, in which she had $1,209 to her credit, and a promissory note on which there was an unpaid balance of $402. The day following Mrs. McCoy became unconscious, and remained so until her death. Except for the statement that the book was delivered in her last illness, and while she was under the apprehension of impending dissolution, the petition does not disclose whether the pleader intended to rest his right of recovery upon a gift inter vivos or causa mortis. Indeed, so far as the circumstances surrounding the gift and the manner of its delivery are concerned, there is no substantial difference between the two classes of gifts. In both cases the thing must be personal property, and there must be a delivery, actual or constructive. In a gift inter vivos, the donor must not only part with the possession of the

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property, but with the dominion over it. It is unconditional and irrevocable. While a gift causa mortis is a gift by a person in sickness, who, apprehending his dissolution, delivers or causes to be delivered to another the possession of any personal goods, to keep as his own in case of the donor's death; and it only takes effect in case the giver dies. It is conditional, and the donor may at any time revoke it. Bouvier's Law Dict. titles "Donato Mortis Causa," "Gifts Inter Vivos;" Duncan's Adm'r v. Duncan, 5 Litt. 12; Meriwether v. Morrison, 78 Ky. 572.

The evidence discloses the following facts concerning the gift: Mrs. McCoy told appellee to go to the cupboard, raise a plate, and get a book that was there. He got the book and gave it to her, when she handed it back to him, saying "This is yours," and requested him to pay her debts and not squander it. This evidence contains all the elements necessary to show a complete delivery, whether it be treated as a gift inter vivos or causa mortis. There was no condition attached showing that it was not to take effect in the event the donor did not die; but, as she did die within a few days thereafter, we think the gift may be sustained either upon the theory that it was a gift inter vivos or a gift causa mortis, as it had many of the features belonging to each class, and none of those that distinguish gifts causa mortis from those inter vivos, except the circumstance that the donor died in a few days thereafter. The lower court, entertaining this view, instructed the jury that "if they believed from the evidence that the decedent, Ellen McCoy, during her lifetime delivered the savings bank deposit book and the note to the plaintiff, W. H. McCoy, with the purpose and intent of giving said note and the money on deposit in said bank to him, the jury

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will find for the plaintiff." The authorities hold, almost without exception, that the delivery of a pass or deposit book in a savings bank transfers the money on deposit to the donee. Jones v. Weakley, 99 Ala. 441, 12 South. 420, 19 L. R. A. 700, 42 Am. St. Rep. 84; Ridden v. Thrall, 125 N. Y. 572, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758; Pierce v. Boston Five Cent Savings Bank, 129 Mass. 425, 37 Am. Rep. 371; Hill v. Stephenson, 63 Me. 364, 18 Am. Rep. 231; McNamara v. McDonald, 69 Conn. 484, 38 Atl. 54, 61 Am. St. Rep. 48; Page v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

In this State the precise point here presented has never been directly adjudicated, except in Ashbrook v. Ryon, 2 Bush, 228, 92 Am. Dec. 481, where the question arose as to whether the delivery of a pass book in an ordinary bank of deposit transferred the money on deposit, and the court, without assigning any reason, simply said: "The money deposited in bank did not pass by the delivery of the pass book, and the gift as to it was not perfect." But in the later appeal of Stepheson's Adm'r v. King, 81 Ky. 425, 5 Ky. Law Rep. 374, 50 Am. Rep. 173, the court, in commenting on this statement and in effect overruling the case, said: "This court, in Ashbrook v. Ryon, held that the delivery of the notes without assignment perfected the gift, and it is there further held that the delivery of the pass book did not give right to the money in bank. Why it did not is not stated; but, if equivalent to a certificate of deposit, we see no reason why it should not have been a complete gift. What evidence the pass book contained of the deposit in that case does not appear. If an ordinary pass book, and it must be so inferred, it was an acknowledgment by the bank that the donor had to

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his credit in the bank that much money; and when actually delivered we cannot see why it did not pass the right." Following the last-named case, which is in harmony with the current of authority, we are of the opinion that there may be a gift of the money on deposit in a bank by the delivery of the pass book; and this, without reference to whether it be a savings bank or an ordinary deposit bank.

A distinction between savings banks and other banks is made in Jones v. Weakley and Page v. Lewis, supra, based upon the ground that in savings banks the fund can only be withdrawn by the production of the pass book, hence it is the best delivery available under the circumstances, while in other banks, as the check of the depositor is sufficient to transfer the funds to the holder of the check, and in fact the usual, if not only, method by which the deposit can be transferred, the production of the book at the bank not being necessary, a check should be made out by the donor, as this would be more appropriate evidence of the gift than the delivery of the book. We are not impressed with the soundness of this attempted distinction. It is well settled that there may be a constructive or symbolical delivery, as of the key to a trunk or vault in which the property is deposited, or a book of accounts. Stephenson v. King, supra; Jones' Adm'r v. Moore, 102 Ky. 593, 19 Ky. Law Rep. 1640, 44 S. W. 126; 14 Am. & Eng. Ency. of Law, p. 1021. And the delivery of a pass or deposit book in any bank as a gift, although symbolical, manifests as clear an intention to transfer to the donee the money represented by it as does any other constructive delivery. The mere fact that a check might be better evidence of the intention to make the gift complete will not be allowed to defeat

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the purpose of the donor. In this class of cases, as well as others, the intention of the giver must be looked into. The purpose with which the delivery is made must be considered; and from the facts and circumstances surrounding the transaction the court or jury trying the case must determine whether or not the gift was designed to be and was completed. Generally the delivery must be as perfect as the nature of the property will admit; but the manifest desire of the donor will not be set aside by a narrow construction that would defeat his purpose. In the case before us there is little room to doubt that Mrs. McCoy by the delivery of the book intended to transfer all that the book represented, and in her eyes it stood for all the money on deposit in the bank. If she had written a check for the amount of her deposit and given it to her son, or if the money, in place of being in bank, had been in her possession, and she had handed it to him, it would not have illustrated with any more clearness or certainty her intention than did the delivery of the book. Ellis v. Secor, 31 Mich. 185, 18 Am. Rep. 178.

It is strongly urged that the law treats these transactions with disfavor, and that they will not be upheld, when involved in doubt or not supported by the most convincing evidence. In a limited sense this is true, and they should be carefully scrutinized, because offering exceptional opportunities for the commission of fraud. But, when established by competent and satisfactory evidence, the courts are no more authorized to set them aside than they would be to annul any other legitimate transaction that was supported by testimony sufficient to sustain it. It is pointed out in the brief of counsel for appellant that the court permitted appellee to introduce evidence

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showing that his mother, previous to the gift, had expressed an intention to leave this property to him, but excluded evidence offered by appellant showing a contrary purpose. To illustrate the intention of the donor, and to show whether or not a gift had been made, evidence indicating a desire upon her part to give this property to her son was competent, as would have been testimony that she had expressed a purpose not to leave it to him. We have carefully examined the record for the purpose of ascertaining the evidence said by counsel to have been excluded, and have not discovered any evidence offered by appellant that was not permitted to go to the jury. In fact, with few trifling exceptions, all the testimony introduced by both of the parties was admitted, and each was allowed the fullest opportunity to present his side of the case.

Complaint is also made that the verdict is flagrantly against the evidence, and for this reason a new trial should be granted. As is usually the case, when there is a controversy touching an issue of fact, the testimony is conflicting; but it was the province of the jury to weigh and determine its sufficiency. The real question at issue was submitted to them by an appropriate instruction, and it cannot be said that their verdict is not supported by sufficient evidence to sustain it.

Finding no prejudicial error in the record, the judgment must be affirmed.

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CASE 92.—ACTION BY THE COMMONWEALTH FOR USE OF BANK OF COLUMBIA AGAINST D. S. WADE'S ADM'R AND OTHERS, ON SAID WADE'S BOND AS TAX COLLECTOR.—October 23.

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Commonwealth, for Use, &c., v. Wade's Adm'r, &c.

Appeal from Taylor Circuit Court.

I. H. THURMAN, Circuit Judge.

From a judgment dismissing the petition plaintiff appeals. Reversed.

1. Taxation—Collection—By "Law."—The term by "law," as used in Ky. Stats., 1903, section 4129, providing that the sheriff shall be collector of all taxes, unless the payment thereof is by law directed to be made to some officer, means a statute, and does not include an order of the fiscal court.
2. Same—Appointment of Collectors—Special Assessments.—Under Ky. Stats., 1903, section 4131, authorizing the county court where there is no sheriff to appoint a collector of all taxes due the State, county, or taxing districts, or a separate collector for money due the State, county, etc., authorized to be collected by the sheriff, only one collector may be appointed to collect the taxes for any division, and, where one is appointed to collect county revenue, another can not be appointed to collect some special assessments therein.
3. Same—Duties of Collectors.—The collectors authorized to be appointed take the place of the sheriff and fill his office so far as the collection of revenue is concerned, and it is their duty to collect all taxes levied and collectible for that year, whether State or county, regular or special.
4. Same—Legality of Appointment—Collector of Special Taxes.—A nomination by the fiscal court of a collector of a special tax is void.
5. Same—Liability on Official Bond.—Under Ky. Stats., 1903, section 4147, providing that if the sheriff or collector of revenue without reasonable excuse fails to pay to any person entitled

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thereto the amount due upon any claim allowed by the fiscal court and payable out of the taxes levied by it, if collected or collectible by him, he and his sureties shall be liable therefor, where a special levy was made by the fiscal court to pay a judgment against a county and a collector of State and county taxes was appointed, and gave bond, and his attention was called to the special tax, but he refused to collect it, but did not pretend that it was not collectible, he and his sureties are liable on his official bond.

6. Same—Necessity for Certification of Levy.—It is the duty of the sheriff or collector of revenue to take notice of the levy of taxes by the fiscal court and to collect and distribute it as by law required, and a special certification of the levy is not required.

JAMES GARNETT and W. W. JONES attorneys for appellant.

PROPOSITION OF LAW AND AUTHORITIES CITED.

1. All taxes for State, county and district purposes, must be levied and collected, under the general laws. (Present Constitution, section 59 and subsection 15 thereof; present Constitution, sections 171, 181, and subsection 1 of section 263; Fidelity and Deposit Co. of Md. v. Logan County, 17 Ky. Law Rep., 66.)

2. The general laws, carrying into effect the provisions of the present Constitution relative to the levy and collection of all kinds of taxes, are ample and complete. (Ky. Stats., sections 1852-3, 1839-40, 1860-7, 1882, 1878, 4131-3-4, 4146-7, 4129, 4168, and 27 Ky. Law Rep., 66.)

3. The bonds executed by Collector Wade, January 13, 1902, under section 4133, bound him and his sureties for the collection of all taxes of whatever kind then levied or might thereafter be levied to be paid out of the assessment of the year 1902. (Ky. Stats., 4131-3-4; Howard v. The Commonwealth, for the use etc., 105 Ky., 608, and Adair, etc., v. Hancock Deposit Bank, 107 Ky. 218.

4. County taxes are due the same time State taxes are due and may be levied any time during the year, and the collector is bound to collect them under whatever bond he has executed. (Ky. Stats., 1868, 1853, 1883-5.)

5. The sheriff or collector must collect all taxes for whatever purpose levied and pay over to the persons entitled thereto. (Ky. Stats., 4131-3-4, 4129, 4147, and 105 Ky., 608, and 107 Ky., 218.)

6. Collector must apportion taxes, when he fails to collect all taxes for all purposes from taxpayer, according to the amount due to State, county, person or fund. (Ky. Stats., 4168.)

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7. A levy of taxes by the fiscal court gives the authority to collect them, and, when the authority is given to collect, the law makes it the duty of the collector to collect them, and the oaths and bonds are required of him to insure the faithful performance of this duty. (Ky. Stats., 4131-3-4, 4147, 4129, 1853.)

8. When a levy is made for a county creditor, he acquires a property interest or vested interest therein, and in effect becomes the creditor of the collector and his sureties, and must look to them for his debt so long as any part of levy remains collectable and must exhaust all his remedies against them before he can return to the county for an additional levy. (Ky. Stats., 4147; 107 Ky., 212.)

9. The bank's debt herein sued on was created under special acts and section 1852 Ky. Stats. (Bank of Columbia v. Taylor Fiscal Court, 112 Ky., 246, and Smith v. Mercer County, 596.)

10. The levy is collectable under section 1853.

11. The attempted appointment of W. B. Trotter by the fiscal court as the collector of the levy of April 3, 1902, was a mere nullity and did not lessen Wade's duty toward appellant or give him an excuse for failing to collect the tax and pay it over according to law. (Jones v. Gallatin County, 78 Ky., 491; Commonwealth, for use, etc., v. Blackwell, 97 Ky., 314; Ky. Stats., 4131-3-4, 4147, 4129, 1853.)

12. No settlement made by the fiscal court and Wade can bind the appellant. (Ky. Stats., 4146; Little v. Strow, 23 Ky. Law Rep. 1829.)

13. Exclusive jurisdiction to appoint collectors is given the county courts. (Ky. Stats., 4131.)

14. Every material allegation of the petition is admitted and all statutes bearing directly upon the questions in this case are quoted in full in the appellant's brief.

H. W. RIVES, attorney for appellees.

1. Appellant in this case has mistaken its remedy; its judgment is against Taylor county; the alleged repudiation is by the county, and not by a single private individual, or even by a ministerial officer who had no official duty imposed upon him by law, or by the orders of any court in connection with the payment of this debt. The county owes the money, and should pay the debt; this has been determined by the courts.

2. If appellant conceives that the action of the fiscal court in making its levy and appointing a collector under the provisions of the special act under which the debt was contracted, was not in good faith, let it proceed against the members of that court, as

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then or now constituted, in some appropriate action in which the persons charged with misconduct may have an opportunity to answer the accusation against them. It is certainly a novel argument, to contend, as do counsel for appellant, before an intelligent court, that the members of the fiscal court acted in bad faith in not requiring Wade to collect the tax, and, therefore on the mere assumption of official misconduct on their part, Wade must answer for its alleged results; the inference is that if the fiscal court had, as appellant desired, appointed Wade the collector, he would have collected the tax, and, therefore, he must answer for the default of the fiscal court and of Trotter.

3. The separate answers of Wade and of the sureties on his bond each presented a complete defense, and the action of the circuit court was right in dismissing appellant's petition. That judgment should, and doubtless will, promptly be affirmed.

AUTHORITIES CITED.

Bank of Columbia v. Taylor County, 65 S. W., 451; Fidelity & Deposit Co. v. Logan County, 27 Ky. Law Rep., 66; Howard, etc., v. Commonwealth, 105 Ky., 605, 49 S. W., 466; Little v. Strow, 66 S. W., 282; Adair et al. v. Hancock Deposit Bank et al., 53 S. W., 295; Montgomery County Court v. Chenault, 47 S. W., 457; Smith v. Mercer County et al., 47 S. W., 596; Maynard v. Commonwealth, 80 Ky., 587; Acts 1878, vol. I, p. 554; Acts 1881, vol. 1, p. 558; Acts 1887-88, vol. I, p. 344; Ky. Stats., sections 1852, 1853, 1860, 1862, 1867, 1878, 1882, 1884, 4129, 4133, 4146 and 4556.

OPINION OF THE COURT BY JUDGE BARKER—Affirming.

The appellant, the Bank of Columbia, obtained a judgment in the Taylor circuit court against the county of Taylor for the sum of $4,000, with interest at the rate of 6 per cent. per annum from the 25th day of March, 1897, until paid. Afterwards it moved the fiscal court to make a levy to pay its judgment. This they declined to do, whereupon the bank instituted an action against the members of the court to compel them to make the levy for the payment of its judgment. Without going into the proceedings of

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that action, it is sufficient to say that judgment was rendered in favor of the county, refusing to require the fiscal court to make the levy prayed for. From that judgment the bank prosecuted an appeal to this court, where it was reversed with directions to the lower court to enter a judgment requiring the members of the fiscal court to make the levy as demanded by the bank. All of this appears more fully in the opinion of this court delivered in the case of Bank of Columbia v. Taylor County, 112 Ky. 243, 65 S. W. 451. Upon the return of the case, a judgment was entered pursuant to the mandate of this court, requiring the fiscal court to make a levy upon the property in the county subject to taxation, at a rate sufficient to pay the bank's judgment. On the 3d day of April, 1902, the fiscal court made a levy of 60 cents on each $100 in value of all property subject to taxation in the county, and appointed W. B. Trotter to collect the same, who failed to qualify or assume the duties of the office in any way. For reasons which we need not stop to examine or comment upon, there had not been for many years a sheriff in Taylor county; that office being vacant and its duties performed from time to time by collectors appointed for that purpose.

On the 13th day of January, 1902, D. S. Wade was appointed collector of taxes both for State and county purposes, and accepted the apointment and qualified for the positions by taking the oath of office and executing the bonds required by law, with appellees J. N. Turner and Henry R. Turner as his sureties on both bonds. The bond executed to the county is as follows: "We, D. S. Wade, special collector of poll tax and ad valorem tax of Taylor county for the year 1902, and J. N. Turner and Henry R. Turner, his

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sureties, bind and obligate ourselves jointly and severally to the Commonwealth of Kentucky, that said D. S. Wade, special collector, shall faithfully perform his duties. Witness our signatures this 13th day of January, 1902. D. S. Wade, J. N. Turner. Henry R. Turner." After the levy of the tax by the fiscal court to pay its judgment, the bank notified the collector, D. S. Wade, thereof, and urged him to at once proceed to collect the tax and pay it over in satisfaction of the judgment. This he wholly failed and refused to do, and no part of the levy was ever collected or paid to the bank. Thereupon the bank instituted this action against the collector on his bond, alleging the foregoing facts and praying a judgment against him and his sureties for the payment of its debt, interest, and costs. To this the defendants filed an answer, which presented the following defenses: First, that the levy to pay the bank's debt was never certified to him for collection; second, that the fiscal court having, in its order making the levy, appointed W. B. Trotter as special collector thereof, it was not the defendant's duty to collect it. A demurrer of the plaintiff to this answer having been overruled, it declined to plead further, and thereupon its petition was dismissed, of which it now complains.

As preliminary to a discussion of the responsibility of the collector, D. S. Wade, for his failure to collect the bank's claim, it is necessary that we should examine certain sections of the Kentucky Statutes of 1903 bearing upon the question in hand; and, in order that these may be before our mind during the discussion, they are copied herein in full. Section 4129: "The sheriff, by virtue of his office, shall be collector of all state, county and district taxes, unless the payment thereof is, by law, directed to be made to some

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other officer." Section 4131: "On the failure of the sheriff to execute bond and qualify as hereinbefore provided, he shall forfeit his office, and the county court may appoint a sheriff to fill the vacancy until a sheriff is elected, or it may appoint a collector for the county of all moneys due the State and county or taxing districts authorized to be collected by the sheriff, or it may appoint a separate collector of the moneys due the State, county or any taxing district thereof during the vacancy in the office of sheriff; and in the event the county court fails for thirty days to appoint a collector of money due the State, the Auditor of Public Accounts may appoint a collector thereof. Such collectors shall, within ten days after their appointment, execute bond as required of the sheriff, to be approved by the county court, and if the bond be not executed within said time, the appointment of another collector may, in like manner, be made and qualified." Section 4147: "The sheriff or collector of the state and county revenue of each county of this Commonwealth shall on the first day of May, June, July, August, September, October, November and December in each year, report under oath, to the county court of his county, the amount of state and county taxes he has collected, together with all fines, forfeitures or money, or any other account that shall have been received or collected by him, showing in said report the amount collected for and belonging to each particular fund, for which such revenue or money may be intended. Said report shall be filed and recorded in a separate book furnished by the county clerk for that purpose, which shall be open for inspection in the office of the county clerk. The sheriff or collector shall be required by the fiscal court to pay a penalty of six per centum on the

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amount of all taxes levied by the said court that shall be uncollected, if collectable, or if collected, shall not have been paid by him on proper demand to the parties or funds entitled thereto, on the first day of January in each year after he was required to collect such taxes, which penalty shall inure to the benefit of the county. And if the sheriff or collector shall, without reasonable excuse, fail to pay to the person entitled thereto upon proper demand of each person, his agent or attorney, the amount due upon any claim allowed by the fiscal court, and payable out of taxes levied by the fiscal court, if collected or collectible by him, he and his sureties on his county revenue bond shall be liable therefor, together with a penalty of fifteen per centum of the amount of such claim which shall be recoverable by the person entitled thereto, or his personal representative, in any court having jurisdiction of the subject-matter. Any sheriff or collector who shall fail to report as herein required shall be liable to indictment in the county of his residence, and fined not less than one hundred dollars nor more than five hundred dollars for each offense."

With these sections of the statute before us, we will now proceed to discuss the duty of the collector, Wade, to collect the levy made for the payment of the bank's judgment. Observe that by the terms of section 4129 the sheriff, by virtue of his office, shall be the collector of all State, county, and district taxes, unless the payment thereof is by law specially directed to be made to some other officer. The words "by law" do not mean an order of the fiscal court. They mean a statute, and therefore, where there is a sheriff in a county, it is his duty to collect all State, county, and district taxes, unless by the terms

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of some statute the collection is to be made by some other officer. If there had been a sheriff in Taylor county, there is no doubt that it would have been his duty to collect the special assessment levied for the judgment of the bank's debt. Now, by section 4131, where there is no sheriff, a collector is authorized to be appointed, and under the terms of the section the county court may appoint one collector to collect the money of the State, county, or taxing district authorized to be collected by the sheriff, or it may appoint a separate collector of the money due the State, the county, or any taxing district thereof during a vacancy in the office of sheriff. This language does not authorize the appointment of one collector to collect the regular revenue of the county and another collector to collect the special assessments as in the case in hand. The authority of appointment of collectors is limited to one collector for all taxes, whether state, county, or district; or the county court may appoint a collector alone to collect State taxes, and another for the county or district; but, when a collector is appointed to collect the county revenue, another may not be appointed to collect some special assessment. The collector or collectors authorized to be appointed by section 4131 take the place of the sheriff, and fill his office so far as the collection of revenue is concerned; and it is their duty to collect all taxes which it would have been the duty of the sheriff to collect had that office been occupied at the time of the levy. D. S. Wade having been appointed both as the collector of the State taxes and the county taxes for the year 1902, it was his duty to collect all taxes levied and collectible for that year, whether State or county, whether regular or special. The nomination of W. B. Trotter

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as collector by the fiscal court was void for want of authority to make it, and the appointee evidently so considered it, as he never qualified or undertook in any way to discharge the duty sought to be thrust upon him. By section 4147, the sheriff or the collector of the State and county revenue of each county is required to report on certain named days to the county court the amount of State and county taxes he has collected, and is liable to a penalty of 6 per cent. on the amount of all taxes levied by the fiscal court that shall be uncollected, if collectible, or, if collected, shall not have been paid by him on proper demand to the parties or funds entitled thereto. And, if the sheriff or collector shall, without reasonable excuse, fail to pay to the person entitled thereto upon proper demand of each person, his agent or attorney, the amount due upon any claim allowed by the fiscal court, and payable out of taxes levied by the fiscal court, if collected or collectible by him, he and his sureties on his county revenue bond are liable therefor, together with a penalty of 15 per centum of the amount of such claim, which shall be recoverable by the person entitled thereto, or his personal representative, in any court having jurisdiction of the subject-matter. This statute seems to cover and be conclusive of the question we are now discussing. Here was a judgment against the county, to pay which a special levy was made of 60 cents on each $100 worth of property in the county subject to taxation. We have seen that it was the collector's duty to collect this tax, and pay off this judgment. Although it is admitted that as soon as the levy was made his attention was called to it and demand was made on him to collect the tax, he failed and refused so to do. He does not pretend that the tax was not collect-

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ible, and therefore his negligence or willful failure to discharge his duty brings him within the very letter of the statute, which makes him and his sureties responsible on his official bond for his delinquency in the premises. This judgment was not for money due under a special railroad tax, but was for money borrowed from the bank to pay off a compromise which the county had made with certain of its creditors holding railroad bonds. This claim was like any ordinary claim against the county, and, the court having ordered the levy to be made to pay it, it was to be collected as the ordinary revenue of the county was to be collected, in the same manner and by the same officers. There is no provision in the statute to which our attention has been called which authorizes generally a special certification of the county levy to the sheriff in order to make it collectible by him, and a careful search on our part has not led to the discovery of any such statutory requirement. It is the duty of the sheriff or collector to take notice of the levy of taxes by the fiscal court, and to collect and pay over or disburse it as by law required. This the collector failed to do, and by the very terms of the statute he is responsible on his bond for the default.

There can be little doubt that the fiscal court, by what they did in the matter, were undertaking to nullify the judgment of the circuit court. The appointment of the special collector, Trotter, of whom nothing was ever afterward heard, and who in no way attempted to qualify as collector, or discharge the duties of that office, point to the fact that this was an arrangement by which the fiscal court could seemingly comply with the judgment, but without, in fact, accomplishing anything. This unlawful pur-

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pose could only be successful by the failure of the regular collector of the revenue to do his duty in the premises, and to collect the taxes provided for by the special levy. Such juggling with the decrees and judgments of the courts cannot be tolerated. Ours, as has often been said, is a government of laws, and, if the judgments of the courts enforcing the law may be thus nullified or disregarded either by overt act or culpable negligence, government is at an end. The county is as amenable to the law as an individual, and it is the high duty of its officials to enforce the law wherever and whenever they are its ministers. There is nothing in the case at bar to excite sympathy for this manifest effort on the part of the county of Taylor, through its officers, to evade the payment of this judgment. The bank loaned it the money in order to compromise at 50 cents on the dollar its outstanding bonds, and there is not the slightest basis for the claim that this debt is either illegal or unjust. The county collects its taxes on all of the bank's property year by year in order to support its government, and then deliberately refuses to pay the corporation that which is admitted to be justly due it. It seems to us high time that it should be taught as a practical lesson, as well as a theory, that there are none so high as to be above the restraints of the law, or so low as to be beneath its protection. The answer of the defendants does not set forth a valid defense to the cause of action set up in the petition, and the general demurrer should have been sustained.

The judgment is reversed for further procedure consistent with this opinion.

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CASE 93.—ACTION BY JOHN MURPHY AGAINST JACKSON MOUNTS ON A REPLEVIN BOND.—October 24.

126 803
d128 510

Mounts v. Murphy

Appeal from Pike Circuit Court.

A. J. KIRK, Circuit Judge.

Judgment for plaintiff, defendant appeals. Reversed.

1. Replevin—Redelivery Bonds—Liabilities.—Civil Code Prac., section 388, provides that in replevin, if the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for the return of the property or its value if the return can not be had and damages for the taking and withholding the same. Held, That, where a plaintiff suing for the possession of property gave a bond to secure the performance of the judgment and was given possession of the property, if defendant neglected on obtaining a judgment to have the damages for the withholding of the property determined in that action, he is barred of any action therefor on the replevin bond.
2. Same—Actions—Right of Actions.—Where plaintiff gave a bond to perform the judgment of the court and obtain possession of the cattle, and the defendant secured judgment for the return of the cattle, or, if this could not be had, for their value when taken, and the cattle were so injured when returned as to be reduced in value, the defendant may recover in an action on the bond for the difference in the value of the cattle when received and when returned.

N. J. AUXIER and P. B. STRATTON for appellant.

QUESTIONS INVOLVED AND AUTHORITIES CITED.

Recovery for breach of bond in action of claim and delivery.

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(Civil Code, section 184; Bates v. Buchanan, 2 Bush, 117; Kentucky Land & Immigration Co. v. Crabtree, 80 S. W., 1161.)

(No brief for appellee.)

OPINION OF THE COURT BY JUDGE NUNN—Reversing.

On the 8th day of August, 1904, Volentine Hatfield instituted an action in the Pike circuit court against appellee, John Murphy, to recover 10 head of work cattle and the rigging belonging to same, which consisted of yokes, chains, grabs, etc., and obtained an order for the immediate delivery of the property. Hatfield executed the bond required by section 184 of the Civil Code of Practice, and appellant became Hatfield's surety. The bond reads as folows: "We undertake to the defendant, John Murphy, that the plaintiff, Volentine Hatfield, shall duly prosecute this action and shall perform the judgment of the court therein by returning the cattle, yokes and chains as described in the petition and order of delivery, ordered to be delivered to the plaintiff if a return be adjudged, and by paying to the defendant, John Murphy, such sums of money as may be adjudged in this action against the plaintiff, not exceeding eight hundred and eighteen dollars and the cost of this action. This October 8th, 1904." The sheriff took charge of the property; appellee, Murphy, the defendant in that action, failing to execute bond and retain the property within the two days prescribed by the Code. The property was turned over to appellant, by the sheriff, who carried it to Virginia, his home. That action was ended with the following order: "This cause being submitted on motion to dismiss because the plaintiff being a nonresident of this State, and the plaintiff re-

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fusing to give bond, it is ordered by the court that the cause be dsmissed for want of said bond for cost as required by the Code, and the defendant further moves the court for the restitution of said property, as described in the pleadings herein, and the court, being advised, orders and adjudges that the defendant, John A. Murphy, is entitled to an order of restitution of said property, if to be had, and, if not to be had, an execution to issue for the sum of $409.00, the value fixed by plaintiff on said property, and the clerk of this court will forthwith issue said order of restitution and upon the return of same, if the said property has not been restored, then the said clerk will issue an execution against the plaintiff, Volentine Hatfield, special receiver of the estate of S. A. Williamson, for the sum of $409.00, the value of the cattle taken under said writ, and the cost of this action."

This action was instituted against the surety seeking to recover of him $25, cost expended in that action, $18 for ox yokes, chains, grabs, etc., which Hatfield failed to return under the order of court above copied, and $400 damages for the detention of the cattle and other property described, for eight months, and $300 damages for the difference between the value of the cattle when taken from him and the value of same when returned under the order of court referred to. Appellants answered, and averred that all the cost of that suit had been paid, which turned out to be true, and denied that they had failed to return the yokes, chains, etc., denied the damages for the detention of the cattle for eight months, and claimed that appellee had no right to recover in this action any damages for the detention of the cattle, averring that this damage, if any, ought to have been assessed when

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the final judgment was rendered in that action, and denied the injury to the cattle, or that they were of less value when returned than when received under order of delivery. The parties had a trial, the jury found in favor of appellant with reference to the yokes, chains, etc., and found in behalf of appellee $300 for the detention of the cattle eight months, and $90 damages for injury to the cattle.

We are of opinion that the court erred in submitting to the jury the question of damages for the detention of the property. This matter should have been presented and determined in the other action, and, as appellee failed to present it and have the matter determined in that action, he is barred from recovering it from the surety on the bond. Section 388 of the Civil Code of Practice reads as follows: "In an action for the possession of specific personal property, the plaintiff may have judgment for its delivery, if it can be had; and, if not, for its value and for damages for its detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for the return of the property, or its value if a return can not be had, and damages for the taking and withholding of the property." This section requires the defendant, in an action for the specific recovery of personal property, if he desires a return of the property, to have the judgment find for him in the alternative, i. e., the property if to be had, if not, its value and damages for the taking and withholding of it. The bond executed by appellant, as surety to Hatfield, provides that the surety is responsible for such sums of money as may be adjudged in the action against the plaintiff. Appellee might have had the question relative to the with-

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holding of the cattle from him settled in that action, and the surety was obligated to pay it; but as the appellee neglected to have that done he is barred of any action against the surety therefor.

We are referred to the case of Kentucky Land & Immigration Co. v. Crabtree, 118 Ky. 395, 26 Ky. Law Rep. 283, 80 S. W. 1161, as authorizing an action on a bond against the surety to recover from him damages when not fixed in the judgment disposing of the action for the claim and delivery of the property. The question in that case was not like the case at bar. In that case the plaintiff in the action obtained possession of some logs by giving the bond and afterwards disposed of them, entered a motion, and dismissed the action without prejudice, and the court decided that it had violated its bond, in that it failed to duly prosecute the action. The court said in that case that: "The plaintiff should not be permitted, by the execution of a bond, to obtain the possession of the property and upon its own motion dismiss the action without prejudice, and thus relieve itself and surety from all responsibility on the bond." This case is different. Here the defendant, now appellee, upon his own motion caused a dismissal of that action and caused judgment to be rendered in his behalf for the property if to be had, if not, for its value, but failed to present and recover the damages he had sustained by the taking and withholding of the property from him. See, also the case of Rogers v. Bradford, 8 Bush, 163.

We are of the opinion that the court did not err in permitting appellee to recover of appellant the difference in the value of the cattle when received by Hatfield and the value when returned. The judgment of the court was for the return of the property,

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if to be had; if not, the value at the time taken from him should be recovered. This surety bound himself, when he signed the bond, that the plaintiff in that action, Hatfield, would perform the judgment of the court. It did not satisfy the obligation when Hatfield returned the oxen, some of them with eyes knocked out and otherwise injured and in poor condition, as the testimony tends to show in this case. It is true that appellee might have elected to refuse the cattle on account of their condition, and collected their value as fixed in the judgment; but he was not bound to do so. He had a right to receive and keep them as a part performance of the judgment of the court. In the 8 Bush case, supra, this court said: "Under this provision we are of opinion that the judgment should have been in the alternative, and should have allowed appellant to discharge it in so far as the value of the property was concerned by its return." In our opinion a plaintiff and his bondsman, in an action for the specific recovery of personal property, should not be absolved from all further liability when a blind horse, made so by the plaintiff, is returned in lieu of a sound one taken from the defendant.

In our opinion the difference in the value of the property at the time taken and when returned may be recovered in an action like this, and such damages are not required by the Code to be fixed in the judgment in the action for claim and delivery of the property. In fact, it would be impossible to do so for the reason the property is at the time of the judgment in the possession of the plaintiff in the action, and not accessible to the defendant for inspection; nor can it be known in what condition the property will be when returned to the defendant.

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For these reasons the judgment of the lower court is reversed and remanded, with directions to the lower court to set aside its judgment and render one in behalf of appellee for $90, with interest from the date of the verdict of the jury, and the cost of the action.

CASE 94.—ACTION BY CITY OF PADUCAH AGAINST J. L. JONES AND HIS SURETIES FOR A VIOLATION OF HIS BOND TO THE CITY AS A SALOON-KEEPER.—October 25.

City of Paducah v. Jones, &c

126 809
s131 686
f134 80

Appeal from McCracken County.

W. M. REED, Circuit Judge.

Judgment for defendants, plaintiff appeals. Reversed.

1. Principal and Surety—Action on Bond—Defense by Surety—Conclusiveness of Judgment Against Principal.—Sureties on a liquor dealer's bond are not estopped, in an action thereon, from showing that their principal had not violated the law, even though in penal proceedings against him he confessed his guilt, or was convicted of the offense.
2. Intoxicating Liquors—Bonds of Dealers — Actions on — Sufficiency of Evidence.—In a suit by the city on a bond conditioned that the principal will conduct his liquor business in a legal manner, evidence examined, and held to warrant the finding that the clerk who made the illicit sales was acting entirely for himself and that his acts were never ratified by the principal.
3. Same—Admissibility of Evidence.—In an action by the city on a bond conditioned that the principal will conduct his liquor business in a legal manner, evidence showing that the

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principal's clerk, who illicitly sold on Sunday, had sold liquor with the knowledge of the principal on previous Sundays, is admissible, since it tends to show whether or not the selling on the Sunday in question was within the scope of the clerk's employment or by the consent of the principal.

4. Same—Offenses—Wrongful Acts of Agent—Employer's Liability.—An employer, irrespective of his instructions or directions, may be proceeded against criminally for the act of his clerk or agent, who, within the scope of his employment, sells or furnishes liquor in violation of law.
5. Same—Ordinances—Power to Enact—Requirement of Bond.—Under Ky. Stats., 1903, section 3058, giving city councils the right to license, tax, and regulate the sale of liquor, the Paducah council had the power to pass an ordinance requiring an applicant for a liquor license to execute a $1,000 bond, with good sureties thereon, conditioned that the applicant will conduct his liquor business in a legal manner, since the requirement is reasonable and proper, and has a tendency to compel an observance of the law.
6. Same—Actions on Bond—Defenses.—In an action by the city on a bond conditioned that the principal will conduct his liquor business in a legal manner, the amount of damages created by the violation of law does not enter into the case, since, if the conditions of the bond have been broken, the sureties are liable for the sum stipulated therein.
7. Same.—In such an action, payment of the fine imposed upon the principal in criminal proceedings for the violation of law will not satisfy the bond.

JAMES CAMPBELL, JR., attorney for appellant.

When regulations are imposed, as in this case, the licensee is criminally liable for their non-observance. The defendant was found by the county commissioners "qualified," and a license was issued to him upon the personal trust that he would conduct the business according to the regulations. The sale here made to a minor was a violation of that trust, and a violation of law. It is no defense that the defendant had no intention to violate the law. "Good intentions" are said by the proverb to be a pavement for another place, but they are not a sound one for a barroom. The law has been violated. It looks to the man it entrusted with the management of this business and holds him liable. It is immaterial whether his liability is based upon his negligence in permitting the sale, or upon both, for the defendant is liable for a

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negligent sale from insufficient supervision of an agent as much as if he ordered the sale. If the clerk, as Judge Cooley says, supra, being in possession of the keys, opens the saloon on Sunday for traffic, the licensee could not excuse himself from liability by his absence or ignorance; nor can he do so in the present case of a sale to the minor by being temporarily absent from the room. The defendant chose to seek for and assume the liabilities of the calling of a saloon-keeper, that he might enjoy its profits. He can not be allowed to enjoy its profits and assign his duties and liabilities to another.

LIST OF AUTHORITIES.

1. Is this action a penal one? (Ballowe v. Comth., 44 S. W., 646; Comth. v. Stringer, 78 Ky., 56; Cullinan v. Burkhard, 86 N. Y., 1003; Current law, vol. 4, p. 262.)

2. Consent to conditions by accepting license.—

(a) Right to regulate saloons delegated to the city. (Subsec. 10, section 3058, Ky. Stats. (1903); McNulty v. Toof, 75 S. W., 258; subsec. 23, section 3058, Ky. Stats. (1903); subsec. 25, section 3058, Ky. Stats. (1903); Cooley's Constitutional Limitations, 743; Dunn v. Comth., 49 S. W., 813.)

(b) Right of the city to adopt and enforce such police regulations as may be expedient and necessary . (Abbott on Municipal Corporations, vol. 1, sections 130-31-32-33; Lodano v. State, 25 Ala., 64; Quintard v. Corcoran, 50 Conn., 34; Hawes v. Maxwell, 32 N. E., 152; People v. Eckman, 63 Hun. 209, 18 N. Y. 654; City of Providence v. Bligh, 10 R. I., 208; O'Flynn v. State, 66 Miss. 7, 5 South. 390; Hogan v. Chief Justice, etc., 27 Tex., 226; State v. Pierce, 26 Kan., 777; Green County v. Wilhite, 29 Mo. App., 459; State v. Walker, 56 N. H., 176; Brown v. Comth., 114 Pa., 335; Grainger v. Hayden, 17 R. I., 179; Jones v. Bates, 4 L. R. S., 495; Blockway v. David Petted, 7 L. R. A., 740; Indiana v. Gerhardt, 33 L. R. A., 313; State v. Beach, 43 N. E., 949; Decker v. Sargeant, 125 Ind., 404; Davis v. Fasig, 128 Ind., 271; Black. Intox. Liquors, section 50; McKinney v. Salem, 77 Ind., 213; State, McKey, v. Bonnell, 119 Ind., 494; Moore v. Indianapolis, 120 Ind., 483; Black, Intox. Liquors, section 51; Nelson v. State, 46 N. E., 941; Shay v. Muncie, 46 N. E., 138.)

3. The liability of Jones for the acts of his agent. Dumain. (Locke v. Comth., 69 S. W., 763; Ky. Stats., sections 2070, 2571; Ellison, etc., v. Comth., 69 S. W., 765; Comth. of Mass. v. Steven, 11 L. R. A., 357; North Carolina v. Kittelle, 15 L. R. A., 694; State v. McBrayer, 98 N. C., 619; State v. Scroggins, 107 N. C., 492; Farrell v. State, 32 Ohio St. 456, 30 A. M. Rep. 614; 1 Whar-

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ton, Crim. Law, 247, 341, 2422; 2 Wharton, Crim. Law, 1153; Carroll v. State, 73 Md., 551; State v. Denson, 31 W. Va., 122; 11 Am. & Eng. Ency. of Law, 718; Mullerr v. Buncombe County Comrs., 89 N. C., 171; State v. Wallace, 94 N. C., 927; State v. McNeeley, 60 N. C., 234; McCutcheon v. People, 69 Ill., 606; Noecker v. People, 91 Ill., 491; Mogler v. State, 47 Ark., 110; Edgar v. State, 45 Ark., 356; Waller v. State, 38 Ark., 656; Loeb V. State, 75 Ga., 258; Snider v. State, 81 Ga., 753; Whiton v. State, 37 Miss., 379; Riley v. State, 43 Miss., 397; Dudley v. Sautoine, 49 Iowa, 650; People v. Roby, 52 Mich. 577, 50 Am. Rep. 270; People v. Blake, 57 Mich., 566; State v. Dickens, 2 N. C., 407; State v. Boyett, 32 N. C., 366; State v. Hart, 61 N. C., 389; State v. Presnell, 34 N. C., 103; Scalfi v. State, 73 S. W., 441; Current Law, vol. 4, p. 262; Cornett v. Comth. (Ky.), 78 S. W., 853; Knott v. Peterson, 101 N. W., 173; Cullinan v. Kuch, 177 N. Y. 303, 69 N. E. 597; People v. Bassing, 100 N. W., 396; People v. Lundell, 99 N. W., 12; People v. Krisel, 98 N. W., 850; Beane v. State, 80 S. W., 573; State v. Terry, 79 S. W., 998; Sinclair v. State, 77 S. W., 621; Pigford v. State, 74 S. W., 323; Comth. v. Nichols, 10 Met. 259, 43 Am. Dec. 432; Hanson v. State, 43 Ind., 550; State v. Pasnell, 2 Hump., 398; State v Mueller, 38 Minn., 497; Comth. v. Major, 6 Dana, 293; Comth. v. Park, 1 Gray, 553; Parker v. State, 4 Ohio St., 563.)

Crice & Ross, attorneys for appellees.

Cities can not enforce their civil contract by fines and penalties. Neither can cities enforce the State law by civil contracts. This bond is a civil contract, as claimed by appellant, for the purpose of compelling parties who are licensed by the city of Paducah to sell liquors by retail to observe the criminal law of the State of Kentucky. It has no power to do this. The Legislature in making it unlawful to sell liquor on Sunday prescribe a penalty for its violation. The Legislature has also, by subsection 25 of section 3058, giving the general council power to impose, enforce and collect fines and forfeitures, and to punish the violation of the laws of the city of the second class by fines and imprisonment or both. But the general council of Paducah has not adopted any ordinance making it unlawful to sell liquor in the city of Paducah on Sunday, and it has not by any ordinance fixed any penalty for the violation of the State law by selling liquor in Paducah on Sunday. The only way the city is given power to enforce the observance of the criminal law is by punishing the violator by fines and imprisonment or both, to be fixed by an ordinance, and not the semblance of authority is

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given to the city to enforce the observance of the criminal laws of the State by civil contracts such as the bond in this case.

CITATION OF AUTHORITIES.

Equitable L. Assurance Society v. Comth., 28 Ky. Law Rep., 333; Prater v. Comth., 4 Ky. Law Rep., 334; Locke v. Comth., 113 Ky., 864; Ellison et al. v. Comth., 69 S. W., 765; Ky. Stats., section 3058, subsec. 2-10 and 23; City of Covington v. Wood et al., 98 Ky., 345; Yick Wo v. Hopkins, etc., 118 U. S., 356.

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Paducah is a city of the second class, and under section 3058 of the Kentucky Statutes of 1903, the general council have the right "to license, tax and regulate the sale of spirituous, vinous and malt liquors in saloons and coffee houses." In pursuance of this authority, the council enacted an ordinance providing that: "Every person, firm, company or corporation desiring to keep a coffee house, saloon, clubroom, or other establishment wherein spirituous, vinous or malt liquors are sold by retail, shall make application therefor in writing to the general council giving the number of the house, and street on which same is located in which said business is to be carried on, with the receipt of the city treasurer for the amount required for such license as herein fixed, and also the proper receipt of the proper officer for county and State or other license than city license where such license is required; and the names of two good sureties resident of McCracken county, Kentucky, and the owner of real estate therein, as bondsman. If said general council shall approve and accept such sureties and grant said license, the clerk of said city of Paducah shall thereupon issue to the

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said applicant upon his entering into a bond with said sureties to said city according to law in the penalty of one thousand dollars, conditioned that he, she, they or it will keep a quiet, orderly house, and will not permit gaming or riotous or disorderly conduct therein, and shall not keep open his bar nor offer for sale any spirituous, vinous or malt liquors on Sunday; and otherwise comply with all the ordinances of the city of Paducah in relation to coffee houses, saloons and clubrooms. But the clerk shall not issue said license until the said bond is executed as aforesaid, and said person, firm, company or corporation shall not commence business until said license shall issue." Appellee, J. L. Jones, upon his application to keep a coffee house and sell therein spirituous, vinous, and malt liquors, was granted license so to do, and thereupon in compliance with the ordinance executed the following bond, which was accepted by the city: "Know all men by these presents that we, J. L. Jones, as principal, and Adolph Weil and Lee Weil, sureties, are held firmly bound unto the said city of Paducah in the sum of one thousand dollars the payment thereof well and truly to be made, we bind ourselves, our heirs, executors, administrators or assigns, jointly and severally, by these presents, sealed with our seals, and dated this, the 2d day of January, 1905. Now, the condition of this bond is such, whereas the above named J. L. Jones hath obtained from the general council aforesaid a license to keep a coffee house to sell spirituous, vinous, and malt liquors therein in the city of Paducah for one year. Now, if the said J. L. Jones shall well and truly observe the laws of the Commonwealth, and the laws and ordinances of the city of Paducah relating to coffee houses, then this bond is to be void; otherwise

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to remain in full force and effect." Ky. Stats. 1903, section 1303, as well as an ordinance of the city of Paducah, prohibit the sale of spirituous, vinous, or malt liquors on Sunday. A warrant was issued against Jones, charging him with the offense of selling liquor on Sunday, and upon his confession of guilt he was fined, thereupon the city instituted this action upon his bond, seeking to recover thereon the sum of $1,000.

Two interesting questions are presented for our consideration: "First. Was Jones guilty of selling liquor on Sunday? Second. Did the general council have the right as a condition precedent to the issual of licenses to exact the bond in question, and, if so, the facts authorizing it, can there be a recovery for the full amount? The sureties upon the bond of Jones were not estopped by his confession of guilt or conviction of the offense from showing in an action against them that no breach of the bond had been committed. They were not parties to the penal proceeding against him, and, as their liability upon the bond depended upon the question whether or not he had committed a breach of his obligation, they had the right in an action against them to show that he had not. Margoley v. Commonwealth, 3 Metc. 405; Commonwealth v. Stringer, 78 Ky. 56.

The evidence in this action disclosed the following facts: The coffee house conducted by Jones was in the rear of a grocery store also operated by him; the coffee house being separated from the grocery by swinging doors. He employed a clerk to attend to both the coffee house and the grocery, and on the Sunday in question Jones went out in the country, but before leaving gave his key to the clerk, telling him "to open up," not indicating whether he desired him to open the grocery or the saloon, or both. Soon

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after his departure, the clerk did "open up," and during the day before the return of Jones sold liquor to numbers of persons. When Jones returned late in the afternoon, he found in the coffee house or saloon a number of persons, and, after ordering them out, closed the doors. The clerk had been in the employment of Jones for some time, and testified that his duties on Sunday were the same as those during the week, with the exception of the saloon. During his examination, he was asked by counsel for the city if the saloon had not been kept open on other Sundays. Objection was made, and sustained, and it was avowed that the witness, if permitted to answer, would say that on several Sundays the clerk with the knowledge of Jones kept open the saloon, and sold liquor to persons desiring to purchase. The trial judge was of the opinion that Jones was not responsible or liable for the act of his clerk in keeping open the saloon on the Sunday for which it was sought to recover on the bond, as Jones did not authorize the opening of the saloon or the sale of whisky therein, nor did he know or assent thereto or ratify or approve the same; and upon this issue, which was decisive of the case, rendered a judgment in favor of appellee. With the excluded evidence out of the record, it did not appear that the clerk in opening the saloon and selling liquor was acting within the scope of his employment or by the knowledge or with the consent of Jones, but, on the contrary, the inference was that he was acting entirely for himself, and the trial judge was correct in his conclusion; but we are of the opinion that he erred in failing to permit the city to prove that on previous Sundays, with the knowledge and consent of Jones, his clerk had opened the saloon and sold whisky

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therein. This evidence was competent upon the ground that it conduced to show whether or not the selling by the clerk on the Sunday in question was within the scope of his employment or by the consent of Jones. If the clerk of Jones in selling liquor on Sunday or in violation of law was acting within the scope of his employment, or by the consent of Jones, then Jones was liable to prosecution for his acts. Jones merely told his clerk to "open up." He did not give him any other directions, or limit him to selling groceries, or forbid him to sell liquor. What he intended to convey to his clerk by the direction to "open up," depends largely on what his clerk had done on previous Sundays. If theretofore on Sunday he had opened up both the saloon and the grocery, it would seem to follow that the directions gave him authority to do the same on this Sunday, although the conduct of Jones in closing the saloon on his return would indicate that he had not intended that his clerk should open it. If it should appear that the clerk had been in the habit of opening the grocery but not the saloon on Sunday, then the direction to open up would not give him authority to open the saloon, and in opening it he would not be acting within the scope of his employment and Jones would not be liable. However this may be, in view of the indefiniteness of Jones' direction, it was competent for the purpose of explaining the sense in which it was used by Jones and understood by the clerk to show what had been the practice and custom on previous Sundays, and that the clerk in opening up was obeying what he conceived to be the order of Jones in the light of what happened at other times, and the jury, in determining whether or not the clerk was selling with the knowledge or consent of Jones

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or in the scope of his employment, had the right to consider this evidence. If the direction to "open up" meant that the clerk should open the saloon as well as the grocery, then Jones was liable for the clerk's violation of the law, as in selling he was acting within the scope of his employment, and with the consent of Jones, and, in either event, Jones was liable for his acts. The decisions are conflicting upon the question whether or not the master or principal is liable to a criminal prosecution for violations of statutory laws committed by the agent or servant acting within the scope of his employment.

In Massachusetts the rule seems to be that generally the master is not responsible unless in some way he participates in, countenances, or approves the criminal act of his servant (Commonwealth v. Stevens; 153 Mass. 421, 26 N. E. 992, 11 L. R. A. 357, 25 Am. St. Rep. 647), although in that jurisdiction there are exceptions to the rule; the court saying in Commonwealth v. Nichols, 10 Metc. (Mass.) 259, 43 Am. Dec. 433: "It seems to us that in the case of the sale of liquors prohibited by law at the shop or establishment of the principal by the agent or servant usually employed in conducting his business is one of that class of cases in which the master may properly be charged criminally for the acts of the servant." And it is ruled in both the foregoing cases that, if the sale is made by the servant, in opposition to the will of the master, and is in no way approved by him, he is not liable. In North Carolina, the court in an exhaustive opinion in State of North Carolina v. Kittelle, 110 N. C. 560, 15 S. E. 103, 15 L. R. A. 694, 28 Am. St. Rep. 698, after reviewing fully all of the authorities, came to the conclusion that the principal is criminally liable for the conduct

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of his clerk acting within the scope of his employment in selling liquor in violation of law. And this rule prevails in Maryland (Carroll v. State, 63 Md. 551, 3 Atl. 29); Georgia (Snider v. State, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350); Arkansas (Mogler v. State, 47 Ark. 110, 14 S. W. 473); Mississippi (Riley v. State, 43 Miss. 397); Iowa (Dudley v. Sautbine, 49 Iowa, 650, 31 Am. Rep. 165); Michigan (People v. Roby, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270). In the Iowa Case, the court very aptly said: "The argument briefly stated is that the agent is employed for a lawful purpose and no other. If he does an unlawful act and especially forbidden by his principal, he acts outside of his agency. And so it is argued that the statute which imposes a penalty for selling in prohibited cases by the agent has no application to this case. The clerk was employed to sell wine and beer, and, while it is true that in one sense he was not employed to sell to persons in the habit of becoming intoxicated, he was employed to determine who among those applying to purchase were in such habit and to sell to persons who were not. We think, then, that the agent's fault did not consist in doing what was beyond the scope of his agency, but in doing improperly what was within it. Most certainly a principal cannot escape civil liability for his agent's negligence by instructing him not to be guilty of negligence." The Iowa statute under which this prosecution was had provided that it should be unlawful for any person "by agent or otherwise" to sell intoxicating liquors to persons in the habit of becoming intoxicated; but the court did not rest its decision on the wording of this statute, but upon the general principle that in cases of this character the master is liable for the acts of his

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servant within the scope of his employment. In the Michigan case the keeper of a hotel was prosecuted for the act of his clerk in selling liquor on Sunday. The point was made that, as there was no evidence to show that the proprietor consented to the sale or to the opening of the bar, he was not liable for the acts of his clerk. But Judge Cooley, writing for the court, said: "I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." And this court in Locke v. Commonwealth, 113 Ky. 864, 23 Ky. Law Rep. 654, 69 S. W. 763, 38 L. R. A. 237, 101 Am. St. Rep. 374, and Ellison v. Commonwealth, 69 S. W. 765, 24 Ky. Law Rep. 657, approved an instruction which told the jury that, if the sale was made by an authorized agent or clerk in the regular course of business, the defendant was guilty.

If a criminal intent was necessary to constitute the offense of selling liquor on Sunday or to a minor or without license or in violation of law, it would follow that the employer who had directed his clerk not to sell, or if the sale was made without his knowledge, or consent, could not be criminally liable, as the intent necessary to complete the offense would be lacking; but there are a number of statutory offenses in which the law does not inquire into the intention of the person who violates them. His intention is not taken into consideration. It is totally immaterial whether it was good or bad. It is the act constituting the offense that the law looks at and punishes, and

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not the intention of the perpetrator. This rule is applicable to statutory offenses in the nature of police regulations, such as the carrying of concealed deadly weapons, the illegal sale of liquor, gambling, certain species or trespass, injuring property, disturbing lawful assemblies, furnishing cigarettes, and numerous others in the same category. And the character of the business carried on by retail dealers in spirituous liquors, the temptation offered by it to violate the law growing out of the nature of the traffic, renders it peculiarly appropriate that the principle announced should embrace those engaged in it, even more certainly than it does other occupations or transactions where no criminal intent is necessary to constitute a violation of the law. Therefore we do not hesitate to say that the employer may be proceeded against criminally for the act of his clerk or agent, who, in violation of law, sells or furnishes liquor acting within the scope of his employment, and this without reference to the instruction or direction given to him by the employer. When a person obtains a license from the State to sell liquor, and for his own convenience and advantage employs other persons to conduct the business for him, he will be charged with responsibility for their acts, and cannot shield himself from prosecution upon the ground that what they did was contrary to his wishes, or in disobedience of his command. He assumes the risk of their acts in the business for which he has employed them; and, if he desires to save himself harmless, must see to it that his servants while acting for him do not violate the law. In answer to this, the argument is made that, if the servant or clerk violates the law in opposition to his employer's directions, he is acting outside the scope of his employment,

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and hence the employer is not responsible. In a limited sense, and with respect to many crimes, this is true, but in violations of the liquor law, as in sales to inebriates or minors or on prohibited days, it is not. The employer has placed it within the power of his clerk to observe or disobey the law. He has left it to his discretion and judgment, and is answerable for his conduct. The person who obtains the license authorizing the sale of intoxicating liquor cannot by employing others to dispense it evade the responsibility attaching to the personal privilege granted to him. If this could be done, it would be an easy matter for vendors of liquors by retail to escape all of the obligations to observe the law assumed when the license was obtained, under the pretense that the violations were committed without their knowledge or consent, although by persons they have intrusted with the management of the business. When the proper authorities grant to an applicant the privilege of retailing liquor, the person obtaining the license takes it charged with the duty that he will not violate the law, and this obligation he cannot escape by surrendering to perhaps irresponsible clerks or bar-tenders the conduct of his business; and, while receiving the benefits of their illegal sales, protect himself from prosecution upon the ground that he did not authorize or approve their acts. The duty of observing the law imposed by the acceptance of the license attaches to all persons who by employment of the licensee conduct the business under it. Their offense is his offense. Except for his license they could not violate the law, and he will be held responsible for what they do. The law looks to the person intrusted with the authority, and not the subordinate he has seen proper to employ.

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It is argued that the council had no authority to require an applicant for saloon or coffee house license to execute a bond, and therefore the bond is not an enforceable obligation against the sureties. In this contention we cannot concur. The statute has invested these municipalities with the exclusive right to regulate and control the granting of liquor licenses; the only limitation upon their discretion being that the conditions imposed shall not be arbitrary or unreasonable. Within these limitations, they have the right to provide as a precedent to the granting of the license that the applicant shall perform all the conditions imposed. It is with him to decide whether he will accept it or not. The license is not a right that the applicant may demand and have for the asking. It is a mere privilege that the authorities may or may not give in their discretion. It cannot be successfully maintained that the requirement of the execution of a bond that the licensee will observe the law is an unreasonable condition. On the contrary, it is not only a reasonable, but a proper condition, the imposition of which exercises a restraining influence and has a tendency to compel an observance of the law. The licensee who intends to obey the law cannot object to giving surety for his good behavior, while the applicant who contemplates its violation will find his way beset with more than ordinary trouble. In fact, he takes the license subject to all the laws in force regulating or prohibiting the sale of liquor, and they become a part of the license. The bond executed by the licensee is nothing more than security that he will obey the law. The sureties in the bond bind themselves that he will do this. It is on their part a contract obligation; and, if the bond is broken, as between them and the licensing authori-

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ties, they are liable for the sum stipulated in it. The question of the amount of damages caused by the violation of the law by the principal does not, and cannot, enter into the question. It is not contemplated that the recovery should be for any less sum than that fixed. It would be totally impracticable if not impossible in an action by the city on the bond to arrive at any measure of damage, except the amount stipulated. In an action upon a bond properly executed, the only legitimate subject of inquiry is whether or not the conditions of the bond have been broken. If it has, the sureties by the letter of their undertaking agree that they will pay a certain sum. Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780; State v. Corron, 73 N. H. 434, 62 Atl. 1044. Nor will the bond be satisfied by the payment of the fine imposed in criminal proceedings against the principal. It is an independent obligation exacted as additional protection to compel an observance of the law, and the sureties are bound by the terms of their undertaking to pay the full amount specified if its conditions have been broken. The requirement of a bond with surety in a fixed sum would be almost a useless formality if it could be satisfied by the payment of a fine entered against the principal. This idea is not embraced either in the letter or meaning of the bond. There is no mention that the satisfaction of the fine will discharge it. The collection of the penalty is a matter between the municipality and the offender, and the sureties have no concern in its payment, and are not responsible for it.

Wherefore the judgment is reversed with directions for a new trial not inconsistent with this opinion.

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CASE 95.—ACTION BY WILLIAM McCARLEY'S EXECUTOR AGAINST MARY N. BLACK ON A NOTE. IN WHICH SHE PLEADS HER NON-LIABILITY AS SURETY OF HER HUSBAND, WHO WAS PRINCIPAL THEREON.—October 29.

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Black v. McCarley's Ex'r.

Appeal from Hopkins Circuit Court.

J. F. GORDON, Circuit Judge.

Judgment for plaintiff, defendant appeals — Reversed.

1. Appeal—Review—Harmless Error—Pleading.—The rejection of an amended answer was not prejudicial, where defendant under the original answer had the right to prove all the facts set up in the amended answer.
2. Husband and Wife—Separate Estate of Wife—Liability as Surety—Evidence.—Ky. Stats., 1903, section 2127, provides that no part of a married woman's estate shall be subjected to the payment or satisfaction of any liability on a contract made after marriage to answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed, mortgage, or other conveyance. Held, That where a note signed by defendants, husband and wife, did not disclose which of the parties was principal or surety, it was competent for the wife to show by parol or other evidence that she was only a surety.
3. Same.—There being no evidence to establish that the wife received the proceeds of the note, and there being evidence that the proceeds were paid solely to the husband, a prima facie case was made out in her behalf.
4. Principal and Surety—Married Women.—Whether a married woman is surety on a note or other instrument is to be determined by the evidence, and controlled by the principles applicable to principals and sureties generally.
5. Witnesses—Transactions with Deceased Persons.—Civil Code

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Prac., section 606, provides that a party can not testify for himself concerning any verbal statement or, of any transaction with, or any act done or omitted to be done by, one who is dead when the testimony is offered. Held, that where, in an action by the executor of the payee of a note signed by a husband and wife, the wife alleged that she was merely surety on the note, it was not competent for her to testify that she did not sign the note, nor received the proceeds thereof, or as to what disposition was made of the money.

VANCE & LOCKETT, attorneys for appellant.

AUTHORITIES CITED.

1. Cases wherein the operation of the "woman's Act" (March 15th, 1894,), are discussed. (Section 2127, Ky. Stats.; Tompkins v. Triplett, 23 Ky. Law Rep., 395; Postell v. Crumbaugh, 23 Ky. Law Rep., 2193; Deposit Bank of Carlisle v. Stitt, 21 Ky. Law Rep., 671; Russell v. Rice, 19 Ky. Law Rep., 1613; Crumbaugh v. Postell, 20 Ky. Law Rep., 1366; Quisenberry v. Thompson, 19 Ky. Law Rep., 1555; Skinner v. Lynn, 21 Ky. Law Rep., 185; Planters' Bank & Trust Co. v. Majors, 25 Ky. Law Rep., 702; Bowron v. Curd, 88 S. W. Rep., 1106.)

2. Authority on right of defendant to testify against claim sued on by personal representative. (Hunter's Adm'r v. March, 2 Ky. Law Rep., 240.)

3. Cases in which court of appeals have declared it the duty of the trial court to define words and expressions. ("Renting"—Boltz v. Miller, 23 Ky. Law Rep., 991; "Gross and Willful Neglect"—L. & N. R. R. Co. v. Yowell, 10 Ky. Law Rep., 721; "Negligence—Ordinary Care."—L. & N. R. R. Co. v. Logsdon, 24 Ky. Law Rep., 1566; "Law and Facts"—Justices of Butler Co. v. Thomasson, 11 Bush, 235; "Actual Possession—Ownership"—McArthur v. City of Dayton, 19 Ky. Law Rep., 882.

P. W. MILLER and RUBY LAFFOON for appellee.

POINTS AND AUTHORITIES.

1. Husband who is joint obligor in note with wife sued on by administrator of payee in note not a competent witness. (Civil Code Prac., section 606; Bright's Ex'rs v. Swinebroad, 21 Ky. Law Rep., 369; Phillips v. Farley, 23 Ky. Law Rep., 2201; Mullikin v. Mullikin, 15 Ky. Law Rep., 609; Andrews v. Haden, 88 Ky., 455;

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Alexander's Ex'rs v. Alford, etc., 89 Ky., 185.)

2. Appellant not a competent witness in suit by administrator of payee of her note, but having testified before the jury now estopped to complain. (Subsec. 2 of section 606, Civil Code, and division "C" thereunder; Pope v. Pope, 21 Ky. Law Rep., 1376.)

3. The Weisinger Act (section 2127, Ky. Stats.), its spirit, and construction by this court. Not intended to enable a married woman alone or in conjunction with her husband to perpetuate a fraud. Not applicable to case at bar. Doctrine of estoppel. (Mundo & McGraw v. Anderson, 23 Ky. Law Rep., 663; Tompkins v. Triplett, 23 Ky. Law Rep., 305; Tichenor v. Owensboro Savings Bank & Trust Co., 24 Ky Law Rep., 145; Smith v. Stone, 17 B. M., 170; Billington v. McAlpin, 22 Ky. Law Rep., 1282; Bush v. Starks, 23 Ky. Law Rep., 1560; Grazure v. Frazure, 23 Ky. Law Rep., 1990.)

4. Facts and points in following cases cited by appellant, wholly different from the one at bar and not applicable. (Postell v. Crumbaugh, 20 Ky. Law Rep., 2193; Deposit Bank of Carlisle v. Stitt, 21 Ky. Law Rep., 671; Russell & Co. v. Rice, 19 Ky. Law Rep., 185; Planters' Bank & Trust Co. v. Majors, 25 Ky. Law Rep., 702.)

5. Not necessary for court to define meaning of ordinary words used in their customary sense. (Bashfields Instruction to Juries, vol. 1, p. 253; J. V. Pilcher Mfg. Co. v. Teupe's Adm'r, 28 Ky. Law Rep., 1350.)

OPINION OF THE COURT BY JUDGE CARROLL—Reversing.

Appellee instituted suit on the following note: "March 30, 1898. One year after date we, or either of us, promise to pay to the order of William McCarley two thousand dollars, with interest at six per cent.; value received. Thomas N. Black. Mary N. Black. I. Biddle Black." The defendant, Mary N. Black, who is the wife of Thomas N. Black, filed an answer, in which she averred that she was only a surety in the note, that at the time of the execution of the note she was the wife of Thomas N. Black, and that the money obtained on the note was paid to and used by him in his business, and no part thereof

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was received by or for her use or benefit. A reply controverting this pleading completed the issues. An amended answer tendered by Mary N. Black was rejected by the court, and of this she complains; but the action of the court in rejecting this amendment was not prejudicial, as under her original answer she had the right to prove all the facts set up in the amended answer. Upon a trial of the case before a jury, judgment was rendered against Mrs. Black for the full amount of the note; and, her motion for a new trial being overruled, she prosecutes this appeal.

No evidence was offered by appellee; the only witnesses who testified in the case being Mrs. Black and Paul Moore. Objection was made to Mrs. Black testifying at all, but this was overruled, and she was permitted, over the objection of appellee, to testify that she did not receive any part of the money for which the note was executed; that the proceeds went to pay her husband's business debts. She also testified that she did not know William McCarley, who lived in Hopkins county, while she resided in Henderson, Ky.; that neither McCarley nor any representative of his was present when she signed the note in the presence of her husband at her home in Henderson. Paul Moore identified a check dated March 29, 1898, drawn by the St. Bernard Coal Company on the Ohio Valley Banking & Trust Company, of Henderson, payable to the order of William McCarley, and indorsed, "Pay to the order of T. N. Black," followed by the indorsement, "Thomas N. Black." Appellant's motion to instruct the jury to find for her being overruled, the court gave the following instruction: "The court instructs the jury to find their verdict against the defendant, Mrs. Mary N. Black, for the amount of the note sued on, subject to the

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credits indorsed thereon, unless the jury should believe from the evidence that the defendant, Mrs. Black, was not in fact a principal in said note, but was only a surety therein, in which event they will find for the defendant, Mrs. Black." To the giving of this instruction the defendant objected, and thereupon offered the following, which was refused: "Although the name of Mary N. Black appears as joint principal in said note, yet if the jury believe from the evidence that at the time of the execution of the note sued on she was the wife of the defendant Thomas N. Black, and that the money for which the note was executed was borrowed by the said Black, and used by him in his individual business, and no part thereof received by the said Mary N. Black, or used for her benefit, or by her individually, or received by her, then in that event she is the surety of her husband, Thomas N. Black, and the jury will so find."

Section 2127 of the Kentucky Statutes of 1903, provides in part that "no part of a married woman's estate shall be subjected to the payment or satisfaction of any liability upon a contract made after marriage to answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed or mortgage or other conveyance." Under this statute, if Mrs. Black was surety for her husband in the note sued on, she is not liable upon it. The note upon its face does not disclose which one of the parties is principal or surety, and it was competent for her to show by parol or other evidence that she was only a surety. Skinner v. Lynn, 51 S. W. 167, 21 Ky. Law Rep. 185. The check payable to Thomas N. Black, for the amount of the note, and which was

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read on the trial, was slight evidence that he was the principal. So far as the appearance of the note was concerned, Mrs. Black was, of course, jointly and severally bound with the other obligors; but the presumption, if any, raised by this fact that she was a principal was overcome by the evidence that the proceeds of the note were paid to him, indicating that he was the beneficiary and the others merely his sureties. The uncontradicted testimony showed that she was his wife at the time of its execution, and, as there was no fact or circumstance conducing to establish that she received the proceeds or any part thereof, a prima facie case was made out in her behalf, and she was entitled to the peremptory instruction requested.

In all the cases that have arisen under this statute the court has endeavored to give it such a construction as would fairly carry into effect the legislative intention in its enactment, which was that the estates of married women should not be charged with the payment of obligations created by their becoming surety for other persons, unless set apart for that purpose by deed, mortgage, or other conveyance. Whether or not a married woman is surety is to be determined by the evidence, and controlled by the principles applicable to principals and sureties generally. Crumbaugh v. Postell, 49 S. W. 334, 20 Ky. Law Rep. 1366; Postell v. Crumbaugh, 66 S. W. 830, 23 Ky. Law Rep. 2193; Deposit Bank of Carlisle v. Stitt, 52 S. W. 950, 21 Ky. Law Rep. 671; Milburn v. Jackson, 52 S. W. 949, 21 Ky. Law Rep. 700; Hall v. Hall, 82 S. W. 269, 26 Ky. Law Rep. 553. An attempt is made to bring this case within the rule announced in Tompkins v. Triplett, 62 S. W. 1021, 23 Ky. Law Rep. 305, upon the assumption that, as no one was

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present when Mrs. Black signed the note except her husband, she delivered it to him as her agent, authorizing him thereby to receive the proceeds, and there being nothing in the appearance of the note to indicate that she was not a principal, she is bound by what her husband did. In the Triplett Case, Tompkins refused to lend the money to Triplett, who applied for the loan, and told him that he would lend it to his wife. Thereupon Triplett procured his wife's signature to a note, her name being signed first, and delivered it to Tompkins, and received the money; and the court held the wife liable. In the case at bar, the name of Thomas N. Black appears first on the note. There is no evidence whatever tending to show that his wife signed the note as principal, or authorized him to receive the proceeds realized from it, or that she received any part of the proceeds, or that she ever occupied any attitude other than that of a surety in the note.

It was not competent for Mrs. Black to testify that she did not sign the note, or that she did not receive the $2,000, or any part of it, for which the note was executed, or to say what disposition was made of the money. Under Civ. Code Prac. section 606, a party cannot testify for himself "concerning any verbal statement of or any transaction with or any act done or omitted to be done" by one who is dead when the testimony is offered to be given. This inhibition, intended to place the living and the representatives of the dead on an equality as near as may be, cannot be evaded by evidence that will indirectly accomplish the purpose intended to be prohibited by the statute. When Mrs. Black was permitted to say that she did not receive any part of the proceeds of the note, it was in effect testifying that the decedent did not pay

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money to her, and hence related to a transaction with or an act done or omitted to be done by him; and so as to her statement with reference to the disposition made of the proceeds which was telling in another way that she did not receive them. Jones v. Jones, 43 S. W. 412, 19 Ky. Law Rep. 1516; Northrip v. Williams, 100 S. W. 1192, 30 Ky. Law Rep. 1279; Harpending's Ex'rs v. Daniel, 80 Ky. 449, 4 Ky. Law Rep. 330, 11 Ky. Law Rep. 858.

The instruction offered by appellant and refused by the court should have been given in lieu of the one that was given, as it presented the defense made by Mrs. Black and upon which she relied to defeat a recovery. Upon a retrial of the case, the converse of this instruction should be given for appellee, if requested.

The judgment is reversed, with directions for a new trial not inconsistent with this opinion.

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CASE 96.—ACTION BY R. BROWN AGAINST M. J. MOSS, JUDGE TWENTY-SIXTH JUDICIAL DISTRICT, TO TEST THE CONSTITUTIONALITY OF AN ACT OF THE LEGISLATURE CREATING A NEW DISTRICT. October 29.

Brown v. Moss, Circuit Judge

Appeal from Whitley Circuit Court.

D. W. SANDERS, Special Judge.

Judgment for defendant, plaintiff appeals—Affirmed.

1. Statutes—Title and Subject—Germane Provisions.—Sess. Acts 1906, p. 12, ch. 4, is entitled "An Act to create the thirty-third judicial district of Kentucky and to change the twenty-sixth, twenty-seventh, and twenty-eighth circuit court judicial districts of Kentucky, and to provide for the holding of courts in the said twenty-sixth, twenty-seventh, twenty-eighth, and thirty-third districts, and to provide for judges and commonwealth's attorneys for same." Held, That as all the provisions of the act related to the establishment of the thirty-third judicial district and recited the changes in the other districts necessary to its creation the act contained but one subject, and its provisions, other than those for the appointment of the judge and commonwealth's attorney, were germane to the title, so that the act was not in violation of Constitution section 51, declaring that no law shall relate to more than one subject, which shall be expressed in its title, etc.
2. Same—Effect of Partial Invalidity—Separate Provisions.—That part of Sess. Acts 1906, p. 12, ch. 4, creating the thirty-third judicial district, which authorized the Governor to appoint the judge and prosecuting attorney in a newly created district until the regular election in 1909, even if invalid, was separable from the other provisions, and therefore did not affect the validity of the act as a whole.

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3. Courts—Judicial Districts—Creation—Statutes.—Sess. Acts 1906, p. 12, ch. 4, creating the thirty-third judicial district, being for the establishment of a new district, was not in contravention of Constitution section 134, providing that the judicial districts shall not be changed except at the first session after an enumeration, unless on the establishment of a new district.

4. Same—Constitutional Provisions—Construction.—Constitution section 128, provides that the Legislature at its first session after the adoption of the Constitution shall divide the State into judicial districts, and that in making the apportionment no county shall be divided, and the number of districts, excluding those in counties having a population of 150,000, shall not exceed one district for each 60,000 of the population of the entire State. Section 132 declares that the General Assembly may establish additional districts, but that the whole number of districts, exclusive of counties having a population of 150,000, shall not exceed at any time one for every 60,000 of population of the State according to the last enumeration. Held, That the number of districts authorized is to be determined by dividing the population of the entire State by 60,000, and not by dividing the population of the State less the population of the only county having a population of more than 150,000 by 60.000.

5. Same—"Population of the State."—The phrase "population of the entire State," as used in Constitution section 128, providing that in making apportionment of judicial districts the number shall not exceed one district for each 60,000 of the population of the entire State, means all of the State's inhabitants.

J. C. BAIRD, attorney for appellant.

Appellant alleges that the act of February 21, 1906, is null and void.

1. Because the population of the State, according to the last census, deducting the population of counties having one hundred and fifty thousand people or more, is not sufficient to admit of the creation of the thirty third district at that time, and that the act offends against section 132 of the Constiuion.

2. Because the act in allowing and directing the executive to appoint a commonwealth's attorney in the twenty-sixth district, said appointee to hold till 1909, is an infraction of section 152 of the State organic law.

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3. That the act is violative of the Constitution in that it invades the rights of the citizens and voters and tax-payers to choose for themselves who their own officers shall be in said twenty-sixth, and thirty-third districts, at least to the extent of circuit judges and commonwealth's attorneys.

4. That the title of the act is not sufficient. And he further avers that defendant Moss is exercising the functions of circuit judge, threatening, if not restrained therefrom, to issue a proclamation of election to fill a vacancy so called, in the office of commonwealth's attorney in the twenty-sixth district unless enjoined and restrained therefrom.

AUTHORITIES CITED.

Massingale v. Lester, 46 S. W., p. 694; Zimmerman v. Brooks, 80 S. W., p. 442; Yates v. Collins, 82 S. W., p. 282; Debates on Constitutional Convention, pp. 3534 and 5938; Butler v. Stephens, 84 S. W., p. 745; Constitution, sections 128, 132, 138, 137, 152; Yates Co. Clerk v. McDonald, 96 S. W., 865; Robertson v. McCandelass, 96 S. W., 77; Adams v. Roberts, 83 S. W., 1035.

W. C. GILLIS and J. B. SNYDER, attorneys for appellee.

POINTS AND AUTHORITIES CITED.

1. The allegations of the petition do not show appellant entitled to sue as a tax-payer.

2. The petition does not state facts sufficient to entitle appellant to sue for the benefit of the other tax-payers of the State.

3. The relief sought by injunction can not be obtained in an ordinary action.

4. The appellant does not show himself to be a fair representative of the case for whose benefit he attempts to sue.

5. The appellant does not state facts showing that he has been injured or that his property rights have been affected by reason of anything complained of in the petition.

6. The appellant does not show himself entitled to the relief sought.

7. The appellant does not state any cause of action against the appellee.

8. The act of February 21, 1906, is constitutional.

AUTHORITIES CITED.

Roots v. Merriwether, 8 Bush, 411; Comth. v. Cook, 8 Bush,

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224; Winge v. Hayden, 10 Bush, 280; Bentley v. Bustard, 16 B. M., 685; Randall v. Shropshire, 4 Met., 329; Clark v. Hart, 98 Ky., 31; Chambers v. Adair, 23 Ky. Law Rep., 273; Sparks v. Robinson, 115 Ky. 453; Acts 1906, p. 88; Acts 1902, p. 282; Acts 1904, p. 61; Civil Code, section 25; Bardstown & Louisville R. R. Co. v. Metcalfe, 4 Met., 199; Newman, Pleading and Practice, 1 Ed., section 232; City of Covington v. Ludlow, 1 Met., 295; Brown v. B. & L. R. R. Co., Mss. Opinion, 1861; Bowling Green v. Hobson, 3 B. M., 479; City of Lexington v. McQuillan's Heirs, 9 Dana, 514; Comth. v. Wright, 79 Ky., 22; Eakins v. Eakins, 14 Ky. Law Rep., 562; Sullivan v. Berry, 83 Ky., 198; Burnside v. Lincoln Co. Court, 86 Ky., 423; Finley v. Smith, 26 Ky. Law Rep., 564; Ky. Constitution, sections 132, 128; Cooley's Constitutional Limitations, section 66; Higgins v. Prater, 91 Ky., 6; Constitutional Debates, vol. 3, pp. 3265, 3274, 3276, 3277, 3500, 3532, 3547, 3544, 3554; vol. 4, pp. 5696, 5698, 5699, 5700, 5857; Butler v. Stephens, 27 Ky. Law Rep. 241.

OPINION OF THE COURT BY JUDGE BARKER—Affirming.

The question for adjudication presented by this record is the constitutionality of an act of the General Assembly of the Commonwealth of Kentucky, approved February 21, 1906, entitled "An act to create the Thirty-Third judicial district of Kentucky and to change the Twenty-Sixth. Twenty-Seventh and Twenty-Eighth circuit court judicial districts of Kentucky, and to provide for the holding of courts in the said Twenty-Sixth, Twenty-Seventh, and Twenty-Eighth and Thirty-Third districts, and to provide for judges and commonwealth attorneys for same." Chapter 4, p. 12, Sess. Acts 1906.

In order to dispose of the question before us, it will be necessary to examine and construe the following sections of the Constitution:

"Sec. 51. No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised,

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amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be re-enacted and published at length."

"Sec. 125. A circuit court shall be established in each county now existing, or which may hereafter be created, in this commonwealth."

"Sec. 128. At its first session after the adoption of this Constitution, the General Assembly, having due regard to territory, business and population, shall divide the State into a sufficient number of judicial districts to carry into effect the provisions of this Constitution concerning circuit courts. In making such apportionment, no county shall be divided, and the number of said districts, excluding those in counties having a population of one hundred and fifty thousand, shall not exceed one district for each sixty thousand of the population of the entire State."

"Sec. 132. The General Assembly, when deemed necessary, may establish additional districts; but the whole number of districts, exclusive of counties having a population of one hundred and fifty thousand, shall not exceed at any time one for every sixty thousand of population of the State according to the last enumeration."

"Sec. 134. The judicial districts of the State shall not be changed except at the first session after an enumeration, unless upon the establishment of a new district."

By the United States census for 1890 the State of Kentucky contained a population of 1,858,635. By the census of 1900 it had a population of 2,147,174. At both periods of time Jefferson, alone of the counties of Kentucky, had a population of 150,000.

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By the census of 1890 Jefferson county had a population of 188,589. By the census of 1900 it had a population of 234,549.

The first proposition of appellant is that the act in question is unconstitutional because it violates section 51 of the Constitution, in that the provisions of the body are not germane to the title. This position is untenable. An inspection of the title copied above shows that it provides for the creation of the Thirty-Third judicial district of Kentucky; and, while it may be somewhat prolix and unnecessarily circumstantial in its provisions, yet it all relates to the establishment of the Thirty-Third judicial district of Kentucky, and recites the changes in the other districts necessary to its creation. There is therefore clearly but one subject contained in the title, which is, as said before, the establishment of the Thirty-Third judicial district of Kentucky. Nor is there anything in the body of the act foreign to the title. The Thirty-Third judicial district is made up of counties taken from the Twenty-Sixth, Twenty-Seventh and Twenty-Eighth districts, and this necessarily caused some shiftings and changes which were required to be recited in the act in order to express the whole will of the Legislature; but there is no provision which could have been left out (except the matter of the appointment of the judge and commonwealth's attorney, to be hereafter noticed) without militating against the complete establishment of the district. This being true, all the provisions but those contained in the exception noted above were necessarily germane to the title, and it therefore follows that, so far as section 51 of the Constitution is concerned, the act is constitutional. Wiemer v. Commissioners of the Sinking Fund, 124 Ky. 377, 99 S. W. 242, 30 Ky.

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Law Rep. 523; Brown-Foreman Co. v. Commonwealth, 125 Ky. 402, 101 S. W. 321, 30 Ky. Law Rep. 793; Weber v. Commonwealth, 72 S. W. 30, 24 Ky. Law Rep. 1726.

Assuming, merely for the purposes of the case before us, that so much of the act as authorized the Governor to appoint the judge and prosecuting attorney in the newly created district, until the regular election in 1909 is invalid, that does not avail the appellant here. The part of the act which provides for the appointment of these officers is severable from the other provisions, and could be left out without crippling the remainder, and therefore the act as a whole is not vitiated by the unconstitutional part. Wiemer v. Commissioners of Sinking Fund, supra. The title of the officers, however, is not placed in issue by the record before us, and it is not necessary, therefore, to say anything further upon this point. As the act in question establishes a new district, it is not in contravention of section 134 of the Constitution, but it is obviously within the express permission of that section.

This brings us to the main question insisted on by appellant, that the creation of the Thirty-Third judicial district is in contravention of section 132 of the Constitution. It will very materially simplify and shorten the discussion on this point to state that the question turns on the construction of section 132; it being conceded by the appellant that, if the ascertainment of the whole number of judicial districts permissible by the section in question is to be obtained by dividing the entire population of the Commonwealth by 60,000, the quotient will be more than 33, and the act is constitutional. On the other hand, it is conceded by the appellee that if the number of

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judicial districts is to be obtained by dividing the population of the State, less the population of Jefferson county (the only county having a population of 150,000), by 60,000, the quotient will be less than 33, and the act unconstitutional because it creates a greater number of judicial districts than is permissible by the fundamental law of the State; so that the whole question now before us depends upon whether the number of judicial districts permissible in the State is to be obtained by dividing the entire population of the State by 60,000 or by dividing the population of the State, less the population of Jefferson county, by 60,000. By section 128, above quoted, the convention provided generally for the establishment of circuit judicial districts in this State. This was to be the first division of the State into circuit court judicial districts after the adoption of the Constitution, and the language used is therefore very instructive, and throws a strong cross-light on the construction to be given section 132, as we may feel sure the framers of the Constitution, by the language used in section 128, did not intend to establish a different rule from that laid down in section 132. In other words, sections 128 and 132 were to be consistent with each other. Now, observe the language of section 128 with reference to the original apportionment of the State into circuit judicial districts: "* * * And the number of said districts, excluding those in counties having a population of one hundred and fifty thousand, shall not exceed one district for each sixty thousand of the population of the entire State." Certainly there can be no room here for doubt. There are occasions when elaboration may obscure, but cannot clarify a subject. Nothing could be plainer than the language used above, that the

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number of the districts should be obtained by dividing the population of the entire State by 60,000.

There is no room whatever for the position of appellant that the population of Jefferson county was to be deducted from the population of the State before the division authorized was made. If this had been the intention, the word "remainder" would have been used, instead of the word "entire," and the language would have been: "And the number of said districts, excluding those in counties having a population of one hundred and fifty thousand, shall not exceed one district for each sixty thousand of the population of the remainder of the State." We are not authorized to take such liberties with the language of the Constitution as is involved in changing the words used by its authors. The framers of that instrument were learned men, who understood the use and the meaning of words, and therefore the interpolation of "remainder" for "entire" would be a flagrant violation of that canon of construction which requires the words of such instruments to be given the meaning that will effectuate the intention of the framers. It follows, therefore, from the very force of the language used, that in the first division of the counties of the State into circuit judicial districts section 128 of the Constitution authorized the establishment of as many judicial districts, exclusive of Jefferson county, as the quotient obtained by dividing the population of the State, inclusive of the population of Jefferson county, by 60,000.

The only material difference between sections 132 and 128, in so far as the question we now have under discussion is concerned, is the omission of the word "entire" before the expression "population of the State"; but, as said before, no reason can be given

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for an intentional difference between the sections. Section 128 provided for a general division of all the counties of the State into circuit judicial districts. Section 132 provides for the establishment of additional districts from time to time as the increase in population and legal business renders necessary. The language of section 132, after providing for the establishment of additional districts, is: "But the whole number of districts, exclusive of counties having a population of one hundred and fifty thousand, shall not exceed at any time one for every sixty thousand of population of the State according to the last enumeration." It will be observed that the exclusion is of districts composed of counties having a population of 150,000 from the number of districts, and not the exclusion of the population of counties of 150,000 from the population of the State. And it must be borne in mind that it is the number of districts that is the subject of ascertainment; and this number (exclusive of those districts composed of counties of 150,000 population) is to be obtained by dividing the population of the State by 60,000. Now, there is no language used that would authorize the exclusion of the population of counties having 150,000 inhabitants from the population of the State in ascertaining the dividend to be divided by 60,000 in order to obtain the whole number of districts permissible. When we use the expression "population of the State," we mean all of its inhabitants, and this is all that can be gotten out of the expression "the entire population of the State." That, too, means all of the inhabitants—no more, no less. In framing section 128, although it was somewhat tautological, the convention placed the word "entire" before the expression "population." This was, perhaps, a sacrifice of

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rhetoric in favor of certainty. Uncertainty having thus been eliminated from section 128, it was doubtless deemed unnecessary to repeat the tautology of placing the word "entire" before "population" in section 132.

There is nothing in the opinion in Butler v. Stephens, 119 Ky. 616, 25 Ky. L. R. 241, 84 S. W. 745, which militates against the conclusion we have herein reached. The question before the court in that case was whether each district should have a population of at least 60,000, and it was held that the language of the section of the Constitution involved here only relates to the number of the districts, and that these might be varied as to population in the discretion of the Legislature. But it is recited in the opinion that the first Legislature which met after the adoption of the Constitution, in putting in force section 128, placed the same construction on the language under discussion that we have in this opinion; this being shown by the fact that they created 30 districts, and this could only be done by dividing the population of the whole State by 60,000. Had they deducted from the population of the State the population of Jefferson county, and divided this remainder by 60,000, only 27 districts could have been established. So far as Butler v. Stephens is an authority upon the question in hand, it is in favor of the conclusion we have reached.

As the judgment below was in conformity with the views herein expressed, it is affirmed.

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CASE 97.—ACTION BY THE MASON & HOGE CO. AGAINST THE LOUISVILLE & NASHVILLE R. R. CO. FOR A BALANCE DUE ON A CONTRACT FOR RAILROAD WORK.—October 30.

Louisville & N. R. R. Co. v. Mason & Hoge Co.

Appeal from Jefferson Circuit Court.

(C. P. Branch, 2 Div.) THOMAS R. GORDON, Judge.

From a judgment sustaining a demurrer to the answer defendant appeals—Reversed.

1. Damages—Breach of Contract—Waiver.—Under a contract for the construction of a railroad, providing that, if the contractors failed to complete the work within the time specified, then all the reserved percentage due them under the contract might be retained by the railroad company as liquidated damages, the railroad company, on failure to complete the work within the time specified, ipso facto, became entitled to the reserved percentage, and its right thereto was not waived by not then terminating the contract and by allowing the contractors to complete the same.
2. Same.—Though the railroad, on failure to complete the work within the time specified, had the right to retain the reserved percentage, yet it had no right to retain the stipulated percentage on work done after the time fixed for performance.
3. Contract—Breach—Right to Rescind—Waiver.—Where the construction of a railroad was not completed within the time specified in the contract, but the contractors continued the work, with the consent of the railroad company, the railroad thereby waived its right to rescind the contract, and was bound to pay for the work at the contract price, and the contractors were bound to complete the work within a reasonable time, failing in which they would be liable for actual damages thereby sustained.

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HELM & HELM, attorneys for appellant.

B. D. WARFIELD and H. L. STONE of counsel.

POINTS AND AUTHORITIES.

A provision in a building contract that the employer may retain a certain per cent of the contract price as liquidated damages as compensation for injury, caused by breach of the contract, is enforceable. (Sedgwick on the Measure of Damages, side page 422; E. & P. R. Co., 9 Bush, 959; Kilburn v. Burt, 111 Ky., 694; Stephens v. Essex, 143 F. R., 844; Sun Printing Co. v. Moore, 183 U. S., 642.)

HUMPHREY & HUMPHREY and L. R. YEAMAN for appellee.

POINTS AND AUTHORITIES.

The contract provided that the work should be completed by February 1, 1904, and gave appellant the two-fold right, in the event the work should not progress with a sufficient speed to insure its completion by the agreed date, to employ, at appellee's expense, any additional force necessary to secure its completion in time, or to annul the contract; and as appellant failed to avail itself of either of these powers, but, on the contrary, allowed appellee to continue on with the work after the date stipulated, and continued to make monthly estimates and payments until the work was finally completed, some fifteen months after the date originally fixed, appellant must be held to have waived the provision calling for completion by February 1, 1904, and, therefore, it also waived its right to liquidated damages for appellee's failure to complete the work by the date agreed upon. (Henderson Bridge Co. v .O'Connor & McCulloch, 88 Ky., 303; 3 Page on Contracts, section 1502; 30 Am. & Eng. Ency. 2 Ed., p. 1259; Walker v. London & Northwestern Ry. Co., Law Rep., 1 Com. Pleas Div., 518; Grant v. Savannah Ry. Co., 51 Ga., 348; Rhorer on Railroads, vol. 1, p. 463; Phillips v. Seymour, 91 U. S., 651; Andrews v. Tucker, 127 Ala. 602, 29 Southern 34; McArthur Bros. v. Whitnye, 202 Ill. 527, 67 N. E. 163.)

Additional points and authorities by appellee, on petition for rehearing:

1. In the contract in Henderson Bridge Co. v. O'Connor, 88 Ky., 303, it was held that forfeiture of liquidated damages was contingent upon annulment. This court has held that in the contract in suit, forfeiture was "automatic" without annulment.

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The court further decided that but for this distinction the two contracts would have been "substantially the same."

2. The language of this "automatic" provision for liquidated damages precludes the idea that the parties intended that appellant can recover liquidated damages and in addition actual damages.

3. The fundamental canon of construction is that courts will endeavor to give that meaning to a contract which was most likely in the minds of the parties themselves. Appellant and its counsel admitted that appellant has always understood the contract to mean that the liquidated damages should be in lieu of all actual damages.

4. This court has held, upon the supposed authority of Henderson Bridge Co. v. O'Connor, that after the expiration of the time limit appellant no longer had the right to annul the contract. But the doctrine in Henderson Bridge Co. v. O'Connor is exactly the reverse of this. That case held that the right to annul existed even after the expiration of the time limit; that this was the only remedy open to the bridge company, and hence that the bridge company could not counterclaim for actual damages sustained by reason of delay in completion.

5. The court's decision is directly at variance with the following rule, which is practically universal, viz.: Where a contract contains a provision for liquidated damages in case of breach, and the provision is construed to be not a penalty but a bona fide provision for liquidated damages, the provision stipulating the damages is binding upon the parties, and evidence aliunde as to the actual damage will not be admitted either to reduce or augment the amount of recovery. Prior to the decision in this case, that rule was the law of Kentucky. (Applegate v. Jacoby, 9 Dana, 206; Louisville Water Co. v. Youngstown Bridge Co. (Sup. Ct.), 16 Ky. Law Rep., 350; Woodbury v. Turner, etc., 96 Ky., 459; Kilbourne v. Burt & Brabb Lumber Co., 111 Ky., 693. And it is the law elsewhere. 19 Am. & Eng. Ency. of Law 2d Ed., p. 422; Sun Printing, etc., Association v. Moore, 183 U. S., 642; Stephens v. Essex County Park Com. ,143 Fed., 844; Donovan v. Haneuer (Utah), 90 Pac., 569; Kunkle v. Wherry, 139 Pa. St. 198, 42 Alt. 112; Smith v. Vail, 65 N. Y. Supp., 834; Wood v. Niagara Falls Paper Co., 121 Fed., 818; Mondamin Meadows Dairy Co. v. Brudi, 163 Ind. 642, 72 N. E., 643; Woodford v. Kelley, 18 S. D. 615 101 N. W. 1069; Darrow v. Cornell, 52 N. Y. Supp., 1081; Morrison v. Richardson (Mass.), 80 N. E., 468; Go Fun v. Fidalgo Co., 37 Wash. 238, 79 Pac. 797; Jackson v. Hunt, 76 Vt. 284, 56 Atl. 1010; Brooks v. City of Wichita, 114 Fed., 297; Welch v. McDonald, 85 Va. 506, 8 S. E. 711; Morrison v. Ash-

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burn (Tex. Civ. App.), 21 S. W., 993; Collier v. Betterton, 87 Tex. 440, 29 S. W. 467; Texas & St. L. Ry. Co. v. Rust, 19 Fed., 239; Miller v. Rankin (Pa. St.), 11 Atl., 615.)

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

On April 21, 1903, a written contract was entered into between the Louisville & Nashville Railroad Company and the Mason & Hoge Company, whereby the latter undertook to build for the former 15½ miles of railroad. The contract, among other things, contained these provisions: "And the said contractors agree to commence the said work within ten days from the date of this agreement, and to proceed with and complete the same to the satisfaction of the engineer by the first day of February, A. D. 1904. And it is further agreed that the time herein stipulated shall be considered as of the essence of this agreement. It is further agreed and understood, if at any time the contractors shall refuse or neglect to prosecute the work with a force sufficient, in the opinion of the engineer, for its completion within the time specified in this agreement, then, and in that case, the engineer in charge, or such other person as the engineer may designate, may proceed to employ such a number of workmen, laborers, and overseers as may, in the opinion of the said engineer, be necessary to insure the completion of the work within the time heretofore mentioned, at such wages as he may find it necessary or expedient to give, pay all persons so employed, and charge the amount so paid to the contractors, as for so much money paid to the contractors on this contract; or the said engineer may, at his discretion, for the failure to prosecute the work with an adequate force, for noncompliance

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with his directions in regard to the manner of constructing it, or for any other omission or neglect of the requirements of this agreement and specifications on the part of the contractors, declare this contract abandoned which declaration of abandonment shall exonerate the Louisville & Nashville Railroad Company from any and all obligations and liabilities arising under this contract, the same as if this agreement had never been made; and the reserved percentage of ten per cent. upon any work done by the contractors may be retained forever by the said company. And it is further agreed that if the said contractors fail to complete said work according to this contract, and the specifications, a part thereof, by the first day of February, 1904, as aforesaid, that then they will surrender to the Louisville & Nashville Railroad Company all of the retained percentage due them under this contract; and they hereby agree with the Louisville & Nashville Railroad Company that it may hold as its own the whole of said retained percentage as reasonable liquidated damages for the failure on the part of said contractors to complete said work by said first day of February, 1904, and it is hereby distinctly agreed by the parties that they do hereby fix the liquidated damages for the breach of this contract, as aforesaid, with respect to the time of the completion of the work at the amount of the whole of said retained percentage, whatever it may be on the first day of February, 1904. On or about the first day of each month, during the progress of the work, the engineer shall make, or cause to be made, an estimate of the value of the work by the contractors, during the preceding month, according to the prices set forth in the schedule or list hereinbefore given, and on or about the 20th day of the

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month 90 per cent. of such estimate shall be paid to the contractors at the office of the railroad company, in Louisville, Ky., in cash. Monthly estimates shall be considered as advances upon the final estimate, and shall be deducted therefrom. When all the work embraced in this contract shall have been completed agreeably to the specifications, and in accordance with the directions and to the satisfaction and acceptance of the engineer, there shall be a final estimate made of the quantity, classification and value of said work agreeable to the prices set forth in said schedule, the balance appearing due to the contractors shall be paid to them when, and not until, the engineer shall make his written final certificate that the work had been fully and completely performed to his satisfaction, and the railroad company shall only be bound to pay the amount so certified to be due; and upon making said payment they shall give a release, under seal, to the railroad company from all claims or demands whatsoever growing in any manner out of this contract, and in computing the said final estimate, and giving the said final certificate, the said engineer shall not be bound by any preceding estimate, but such preceding estimates shall be held to be only approximate to the final estimate, and the said monthly estimates on unfinished work shall in no case be taken as an acceptance of the work or a release of the said contractors from responsibility therefor, until the final estimate and certificate are made, and the work in its entirety is accepted by the engineer as complete under this agreement."

The Mason & Hoge Company did not begin the work within the time named, and failed to complete it until May, 1905. At the time the contract was made, it was understood that the Mason & Hoge Com-

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pany would construct a tunnel included in the work, and that the firm of Dunn & Lallande Bros. would construct the remainder of the work. The railroad company did not insist upon its right to terminate the contract when the work was not completed by February 1, 1904, but allowed the contractors to continue the work as before. Dunn & Lallande Bros. completed the portion of the work assigned to them, which was all of the work except the construction of the tunnel, in October, 1904, and the railroad company then paid Dunn & Lallande Bros. the full amount of the final estimate for their part of the work. This payment was made under a written contract signed by all the parties, which stipulated as follows: "That in any litigation that may arise under said contract the rights of the parties shall be determined as if said payment had not been made, except that the railroad company shall be entitled to credit for the full amount thereof." The railroad company continued to hold back 10 per cent. of the monthly estimates until the tunnel was completed in May, 1905, and it then claimed the right to hold the 10 per cent., which had been retained because the work was not done within the time specified in the contract. The Mason & Hoge Company thereupon filed this suit to recover from the railroad company the sum of $18,512.40. The railroad company filed an answer, to which the circuit court sustained a demurrer, and the railroad company appeals.

The judgment of the circuit court is based upon the ground that the railroad company, by not terminating the contract and allowing the contractors to complete the work, waived its right to retain the 10 per cent. reserved in the monthly estimates, and that having waived this it could not resort to any other remedy

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to recover damages for the noncompletion of the work in time. In support of this view, we are referred to Henderson Bridge Co. v. O'Connor, 88 Ky. 303, 11 Ky. L. R. 146, 11 S. W. 18, 957; Phillips v. Seymour, 91 U. S. 646, 23 L. Ed. 341; Walker v. Railroad Co., 1. C. P. Div. 518; Grant v. Railroad Co., 51 Ga. 348; Andrews v. Tucker, 127 Ala. 602, 29 South. 34. In Henderson Bridge Co. v. O'Connor, the court said that, when an employer has in any way waived his right to annul a building contract, his right to stipulated damages for either noncompletion of the work or delay by the contractors is also waived, unless there is an express agreement to the contrary. But the contract in that case was materially different from the one before us here. In that case the contract provided, in substance, that, if the work in the judgment of the engineer did not progress with sufficient speed, the bridge company should have the power to annul the contract if it saw proper to do so. Whereupon the contract should become null and void, and the unpaid part of the value of the work done should be forfeited by the contractors to the bridge company. The only contingency in which the value of the work done was forfeited to the bridge company was upon its annulment of the contract on the ground stated. If it failed to annul the contract, the clause in regard to the forfeiting of the value of the work done necessarily did not apply. The contract before us provides that, if the contractors fail to prosecute the work with a sufficient force in the opinion of the engineer for its completion within the time specified in the agreement, then the railroad company may proceed to employ a sufficient force to complete the work within the time limited, or the engineer may at his discretion declare the contract abandoned. In this

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event the reserve percentage of 10 per cent. upon any work done by the contractors may be retained by the company. This clause is substantially the same as the contract in Henderson Bridge Co. v. O'Connor; but the contract in this case has this further provision that, if the contractors fail to complete the work by February 1, 1904, then all the retained percentage due them under the contract shall be retained by the railroad company as liquidated damages for the breach of the contract. This clause then concludes with these words: "It is hereby distinctly agreed by the parties that they do hereby fix the liquidated damages for the breach of this contract as aforesaid, with respect to the time of the completion of the work at the amount of the whole of said retained percentage, whatever it may be on the first day of February, 1904." The contract before the court in Henderson Bridge Co. v. O'Connor contained no such clause as this, and therefore that case is not applicable here. The case of Phillips v. Seymour involved a contract which was similar to that before the court in Henderson Bridge Co. v. O'Connor, and which did not contain any clause similar to that above quoted from the contract in this case. In Walker v. Railroad Co. the contract was also similar to that in the case of Henderson Bridge Co. v. O'Connor, and it was there held that the railroad company, by allowing the contractors to continue with the work after the time fixed for the completion of the contract, waived its right to annul the contract and take possession of the work. This was the only question determined in the case. The contract in the case of Grant v. Railroad Co., 51 Ga. 348, was also of the same character. The plaintiffs had failed to avail themselves of the contract right to

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terminate the contract. Andrews v. Tucker, 127 Ala. 602, 29 South. 34, is to the same effect.

In none of these cases was there a stipulation in the contract that, if the work was not completed within the time limited, the railroad company should ispo facto have the right to hold any retained percentage as liquidated damages for the breach of the contract. In the contract before us, the railroad company, without any action on its part, when the work was not completed by February 1, 1904, was entitled to retain the 10 per cent. in its hands as expressed in the contract, "whatever it may be on February 1, 1904." There was nothing in its conduct in allowing the contractors to go on with the work which waived its right to these liquidated damages. The right had become absolute. The money was in its hands, and by the terms of the contract it had the right to retain it. But while it had the right to retain the percentage in its hands whatever it was on February 1, 1904, it had no right to retain the 10 per cent. on work done thereafter. The contract gave it only the right to hold as its own the amount of the percentage retained and in its hands on February 1, 1904. Contracts of this sort for liquidated damages are limited to their terms. What then are the rights of the parties as to the work done after February 1, 1904? Could the contractors take their own time to do the work, regardless of the loss which might result to the railroad company? The railroad company, as held in the case above cited, had no right after February 1, 1904, to annul the contract and take possession of the work or to put additional hands upon it, for these provisions of the contract all manifestly refer to the work to be done before February 1, 1904, and were inserted to secure the completion of the

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work by that time. When that time had passed, and the contractors continued the work with the consent of the railroad company, the latter company having waived its right to annul the contract, the law created an implied contract between them, by which the railroad company was bound to pay for the work at the contract price, and the contractors were bound to proceed with the work with reasonable diligence so as to complete it within a reasonable time. In Phillips v. Seymour, the United States Supreme Court said: "As we have stated above, we are inclined to the opinion that defendant did not, by any of the acts proved in this case, waive its right to damages arising from this failure of the plaintiffs to complete the sections in time, but only waived the forfeiture, if it may be so called, of all right on the part of plaintiffs to sue." In McIntire v. Barnes, 4 Colo. 285, where a similar question was presented, the court said: "According to the terms of the contract, the building was to have been finished June 15, 1875; but McIntire, by permitting Sybrant to work on his contract after the expiration of the time, waived his right to rescind the contract on that ground. But, by consenting to the extension, he did not thereby waive such damages as he may have sustained by reason of the delay." See, also, to same effect Sinclair v. Tallmadge, 35 Barb. (N. Y.) 602.

We conclude, therefore, that, under the allegations of the answer, the railroad company is entitled to keep the 10 per cent. which had been held back and was in its hands on February 1, 1904; and that if after February 1, 1904, the contractor failed to prosecute the work with reasonable diligence so as to complete it within a reasonable time, it is further liable to the railroad company for such actual damages as it

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sustained by reason of the noncompletion of the work within a reasonable time after February 1, 1904. On the return of the case to the circuit court, the defendant will be allowed to amend its answer so as to plead the matters we have indicated, if it desires to do so.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

Petition for rehearing by appellee overruled.

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INDEX

ACCOMPLICES—See Criminal Law, 1, 2, 3.

APPPEALS—See Criminal Law, 1, 5, 7, 15—New Trials 3.

1. Costs—Appeal—Affirmance—Undertaking—Damages.—A judgment ordering a party to pay a specific sum into court, and authorizing the adverse party to withdraw it as soon as paid, is a judgment for the payment of money, within Civ. Code Prac. Sec. 764, providing that, on the affirmance of a judgment "for the payment of money," the collection of which has been superseded, 1 per cent. damages on the amount superseded shall be awarded against appellant. Robinson Norton & Co. v. Corsicana Cotton Factory.....75

2. Supersedeas.—Where the circuit court renders a default judgment, and at a later term overrules a motion to set aside such judgment and grant a new trial, the appeal then granted by the circuit court is only from the judgment denying a new trial, and the supersedeas then issued by the clerk thereof, on the execution of the supesedeas bond before him, does not prevent execution on the default judgment, such court, under Civ. Code Prac., section 734, not having jurisdiction to grant an appeal from its judgment, except at the term at which it was rendered, and the clerk of such court having no authority to accept a supersedeas bond or issue a supersedeas as to such judgment, no appeal therefrom having been granted by such court; section 759 providing that the bond must be executed before the clerk of the court granting the appeal. Asher v. Cornett.....569

3. Criminal Law—Appeal—Supersedeas—Operation and Effect.—Criminal Code Prac., section 348, provides that an appeal in a prosecution for a misdemeanor, must be prayed during the term at which the judgment is rendered, and shall be granted on condition that the record be lodged with the clerk of the court of appeals within 60 days after judgment. Section 349 provides that the appeal shall not suspend the execution of the judgment, unless defendant execute before the clerk of the circuit court a bond for the payment, if the judgment be affirmed, of the fine and costs, and cause the same to be copied into the transcript, on which being lodged with the clerk of the court of appeals he shall issue a certificate that execution of the judgment is suspended. Held, That the judgment appealed from was suspended on the execution of

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APPEALS—Continued—
the bond, and not only from the time of filing the transcript with the clerk of the court of appeals, and issuance of his certificate. Hazelrigg Co. Judge v. Douglass, &c.,.....738
4. Same.—Constitution section 227 provides that the judges of the county court, justices of the peace, and other officers named shall be subject to indictment for malfeasance in office or wilful neglect, and, on conviction, that their respective offices shall become vacant, but that any such officer shall have the right to appeal to the court of appeals. Ky. Stats., 1903, section 3748, enacted in pursuance of section 227, provides that any such officer on conviction shall be fined as therein prescribed; and that the office held by him shall become vacant, but that he may appeal to a court of appeals. Held, That where, on conviction of a member of the fiscal court of malfeasance in office and judgment entered imposing a fine and declaring his office vacant, he appealed, and executed a supersedeas bond, the operation of the judgment was thereby suspended, both as to the fine and the vacation of his office, and that, pending appeal, he was entitled to perform the duties of his office. Idem.....738
5. Harmless Error—Pleading.—The rejection of an amended answer was not prejudicial, where defendant under the original answer had the right to prove all the facts set up in the amended answer. Black v. McCarley's Exr.....825

ASSESSMENTS OF PROPERTY—See Executors and Administrators, 1.

ATTACHMENTS—
1. Wrongful Attachment—Damages.—A claimant of attached property, who is not made a party to the action, as authorized by Civ. Code Prac., Sec. 29, may intervene in the action and set up his claim, or he may, after judgment sustaining the attachment, sue for the property or its value. Patton v. Madison Nat. Bank.....469
2. Same—Damages.—A claimant of attached property, who seeks damages therefor, can only recover the actual value thereof, in the absence of a showing that the attaching creditor had knowledge that the property was of special value to the claimant. Idem 469

ATTORNEY AT LAW—
Suspension of Attorney—Making False Affidavit.—An attorney at law who voluntarily made a false affidavit to be used in a

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ATTORNEY AT LAW—Continued—

judicial proceeding in which he was not acting as attorney could not be suspended from practice for that reason, since he was absolutely privileged to the same extent as any other witness from any punishment except a criminal prosecution for perjury. Beckner v. Comlth.....318

BANKS AND BANKING—

1 Borrowing Money—Limitations—Notice.—One lending money to a bank limited by its articles of incorporation to the borrowing of money not in excess of a specified sum, without having reason to know that the limit has been exceeded by other loans made to it when added to the loan made, is not affected by the limitation in the articles. Citizens Bank, &c. v. Bank of Waddy, &c.....169

2. Same—Cashier—Apparent Authority.—It is within the apparent scope of the authority of a cashier of a bank to pledge its notes to secure money borrowed by him for the bank in the regular course of business. Idem.....169

3. Same.—The lender of money to a bank through its cashier acted in good faith and in the course of business. There was nothing in the transaction to put him on notice that the cashier exceeded his authority or misapplied the funds of the bank, or that the bank authorities were not regularly constituted and doing their duty. The cashier delivered to the lender a spurious resolution, purporting to have been passed by the bank's board of directors, authorizing the loan and the pledging of the bank's notes as collateral. Held, that the transaction was binding on the bank. Idem.....169

4. Same.—The fact that a lender of money to a bank, through its cashier, held a majority of the bank's stock as collateral security for a loan to the cashier, did not apprise the lender that there were no directors or that the stockholders were taking no interest in the management of the bank, and the bank was liable for the amount of the loan. Idem.....169

5. Same.—A bank may restrict the authority of its cashier, and, when this is done, it is bound to those having notice, actual or constructive, of the restriction, to the extent of the cashier's actual authority. Idem.....169

6. Same.—The validity of transactions resulting in the making of a loan to a bank and receiving its notes as collateral security must be judged by what the lender knew when it lent the money in the first instance, and not by what it learned afterward and before it took a renewal note. Idem.....170

7. Bills and Notes—Bona Fide Holders.—A debtor of a bank gave

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BANKS AND BANKING—Continued—
a note for the amount of the debt. The cashier pledged the note as collateral security for a loan to the bank. When the note became due, the debtor gave a renewal note, and the cashier promised to return the original note. The cashier did not return it, but pledged the new note as collateral security for a loan to the bank by another party. Held, that the debtor was liable to both lenders, who must exhaust other collaterals before they could call on the debtor for more than the amount of the original note, with interest, and what he paid beyond the original note must be deemed a debt against the bank. Idem.....170

BANK DEPOSITS—See Taxation.

BURDEN OF PROOF—See Carriers, 11—Easements. 3.

CARRIERS—See Intoxicating Liquors, 11, 12, 13, 14—Railroads—Master and Servant.

1. Carriage of Goods—Delay in Transportation.—A delay of a month in the transportation of freight a distance of thirty-three miles is unreasonable, and the carrier is liable for the damage sustained. C. & O. Ry. Co. v. Saulsbury.....179
2. Same—Remedy of Shipper—Right to Refuse Goods.—A shipper is not justified because of unreasonable delay in the transportation of his goods to refuse to receive them from the carrier. Idem.....179
3. Same—Right of Carrier.—Where a shipper refuses to receive the goods transported because of delay in the transportation, and the refusal of the carrier to make any concession on account thereof, the carrier has no right to convert the freight to its own use or to dispose of it contrary to law. Idem..179
4. Under Ky. Stats., 1903, Sec. 785, authorizing a carrier having unclaimed freight not perishable in its possession for one year to sell the same at public auction, on giving notice to the consignor and consignee, etc., and to sell perishable freight as soon as it deems a sale necessary, on giving similar notice thereof, and to retain out of the proceeds the expenses of transportation, storage, advertisements, sales, etc., a carrier having in its possession as unclaimed freight corn delivered to it for transportation must, as soon as it is deemed necessary to sell the same, sell it as perishable freight, and give notice thereof, and may, if necessary to sell it at some other place for want of market, transport the

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CARRIERS—Continued—
same to such place, but the sale must be made in the State, and the carrier taking the freight to another state and there selling it converts it. Idem.....179
5. Charities—Hospitals—Negligence—Injury to Employe—Negligence of Employer.—A railroad hospital organization was organized as a corporation independent of defendant railroad; its directors being certain officers of the railroad. All employes of the railroad were, as such members thereof, supporting the hospital by monthly contributions. No profit was derived by the railroad company from the conduct or operation of the hospital. The physicians, surgeons and nurses in charge were selected by the directors and officers. Held, that for failure to select skilful and competent physicians and attendants defendant was liable to an employe injured by reason thereof. Ill. Cent. Ry. Co. v. Buchanan.....288
6. Delay in Transportation—Damages.—For delay of a carrier in delivering freight, there may be recovered not only such damages as normally result therefrom, but such as result from special circumstances known to the carrier at the time of the contract. L. & N. R. R. Co. v. Mink.....337
Same—Special Circumstances—Notice to Carrier.—Where mill machinery was shipped to be repaired, and then by a separate contract shipped back, to give the carrier notice of special circumstances from which damage would arise from delay in transportation, so as to make it liable therefor, it is not enough that the agent with whom the first contract was made knew thereof, there having been no delay in the first shipment, but the agent with whom the second contract was made must have been informed of such circumstances. Idem 337
8. Same — Authority of Agents — Acquiescence — Estoppel.—Though the agent of a carrier at a certain station resigned, and his resignation was accepted, yet, no one else having been appointed for a year, and the company having in the interim left the station keys with him, and he having personally seen to billing freight, though he did not sign the bills of lading, and no notice of his discharge having been given the public, but he having been permitted to act substantially as he had done before, the carrier was estopped by its acquiescence to question his authority as agent as between it and shippers who dealt with him. Idem.....337
9. Same—Damages—Evidence.—Plaintiff, in an action against a carrier for delay in transporting machinery for its sawmill, cannot by way of damages show loss from inability to fill a

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CARRIERS—Continued—
contract for lumber, because of the delay in transportation, in the absence of evidence that the carrier was notified of the fact of such contract. Idem.....358
10. Receipt of Freight—Conclusiveness.—A receipt by a carrier for freight, though not conclusive, creates a presumption that it received the freight directed therein, and the burden is on it to show the contrary. Mussellam v. Cin. N. O. & T. P. Ry. Co.....500
11. Trial—Instructions—Form.—The court should not instruct that the burden of proof is on one of the parties, or that the presumption of law is against him; but the instructions should be so framed as to indicate the burden of proof, without specially referring to it. Idem.....500
12. Loss of Freight — Evidence — Instructions. — Where, in an action for loss of freight, the shipper introduced in evidence the receipt of the initial carrier, the court should charge that the jury should find for plaintiff against the initial carrier, unless they believed that the shipper had not delivered the freight to it; and that they should find for him against the connecting carrier, unless they believed that the initial carrier had not delivered the freight to the connecting carrier. Idem.....500
13. Trial—Question for Jury—Effect of Evidence.—Where, in an action against the initial and connecting carriers for loss of freight, it was shown that the connecting carrier receipted for seven boxes and made a written acknowledgment that one box was missing, the credibility of the testimony explaining away the receipt and the acknowledgment was for the jury. Idem.....500
14. Carriers—Question for Jury.—In an action against the initial and connecting carrier for loss of freight, held, that the questions whether the freight was delivered to the initial carrier, and, if it was, whether it was lost by it, or whether it was lost by the connecting carrier, were for the jury. Idem.....500
15. Evidence—Statements by Agents—Admissibility.—The statements of an agent or a carrier, who is its representative to deliver freight, that a part of the freight of a shipper was missing, and that it would be along in a few days, were competent against the carrier. Idem.....501
16. Carriers—Loss of Freight—Actions—Evidence—.In an action against a carrier for loss of freight, the bill of lading received by the shipper and the waybills which went with the freight were competent evidence against the carrier, though not con-

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CARRIERS—Continued—
clusive. Idem.....501
17. Trial—Question for Jury.—The credibility of evidence in an action against a carrier for loss of freight, which explains the bill of lading received by the shipper and the waybills which went with the freight is for the jury. Idem.....501
18 Evidence—Notice to Produce Secondary Evidence.—Where a paper is in the possession of a party, the adverse party should before trial notify the party to produce it, or procure a rule for its production, and, where the paper is not then produced, or it is shown to be lost, secondary evidence of its contents is admissible. Idem.....501
19. Same—Similar Transactions.—Where, in an action against a carrier for loss of freight, the carrier showed that the goods could not have been put in the box delivered to it, evidence that the shipper had packed goods of the same description as those in controversy in a similar box was admissible. Idem 501
20. Property—Evidence of Ownership.—In an action against a carrier for loss of freight, the testimony of a witness that he saw the shipper in possession of goods similar to those alleged to have been lost, is inadmissible. Idem.....501
21 Witnesses—Credibility.—A party testifying in his own behalf should be permitted to state where he has lived and what business he has followed, so as to give the jury a better idea of the weight to be attached to his evidence. Idem....501
22. Trial—Evidence—Rebuttal.—Where, in an action against a carrier for loss of freight, a drayman, who took goods of the shipper to the carrier, testified that only six boxes of freight were taken out at the station, and that the shipper told him that he would take the seventh box with his trunk as baggage, it was competent for the shipper to contradict the drayman. Idem 501
23. Actions—Evidence.—In an action against the initial and connecting carriers for loss of freight, evidence that the waybill, made at the place where the goods were delivered to the connecting carrier, was made out from the waybill which accompanied the car, and not from an inspection of the contents of the car, which was sealed, was admissible to explain how it happened that the connecting carrier receipted for the freight. Idem 502
24. Same.—In an action against a carrier for loss of freight, evidence of the circumstances of the giving of a receipt by the carrier for the freight was admissible to support the defense that the freight had not been delivered to it. Idem.....502

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CARRIERS—Continued—

25. Granting New Trial — Discretion. — The discretion of the circuit court in granting a new trial will not be interfered with unless palpably abused. Idem.....502
26. Loss of Goods—Delivery to Carrier.—A carrier's liability as insurer for a loss of goods begins when the carrier has actually received the goods as a carrier for immediate shipment. Pittsburg, C. C. & St. L. Ry. Co. v. American Tob. Co. 582
27. Same—Bill of Lading—Scope.—A bill of lading issued by a carrier is only prima facie evidence of the receipt of the goods described in it, being open to explanation, and imposing no liability on the carrier as an insurer until the goods are actually received by the carrier. Idem.....582
28. Same—Evidence of Delivery.—Evidence held to show that tobacco was delivered to a carrier for transportation before its destruction by fire, so as to charge the carrier as an insurer with liability for its loss, though no notice was given to the carrier after the loading had been completed. Idem 582
29. Same—Delivery to and Acceptance by Carrier.—When goods designed for immediate shipment are placed in a condition to be carried, in the usual place of loading, in accordance with the custom of dealing between the parties, with the carrier's knowledge of the fact and purpose, or at the place of loading designated by the parties, there is both a delivery to and an acceptance by the carrier. Idem.....582

CATTLE GUARDS—See Railroads, 10.

CHARITABLE INSTITUTIONS—See Taxation, 6.

COLLECTORS OF TAX—See Taxation, 11, 12, 13, 14, 15.

COMMERCE—

1. Duties on Exports—Taxation of Merchandise.—A tax levied upon exported property which operates indirectly as the laying of a duty upon the export is as much within the inhibition of Const. U. S. Art. 1, Sec. 10, providing that no state shall, without the consent of Congress, lay any imposts or duties on exports or imports, as the laying of a duty directly. Comlth. v. Solliger.....66
2. Same.—Const. U. S. Art. 1, Sec. 10, provides that no state shall, without consent of Congress, lay any imposts or duties on imports or exports. Ky. Stats., 1903, Sec. 4020, provides

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COMMERCE—Continued—
that all real and personal estate within this State, and all personal estate of persons residing in this State, shall be taxed. A general tax was laid by the State upon all property alike, and it was sought to tax whisky exported to a foreign country, on the ground that the exportation was colorable only, and to escape taxation, at it was intended to reimport it; or, if the situs of the whisky was in the foreign country, then to tax the warehouse receipts representing it which were owned in this State. Held, that the proposed tax was not an attempt to lay a duty on the whisky, because it was exported, within the meaning of the Const. U. S. Art. 1, Sec. 10. Idem 66

3. Taxation—Liability of Persons and Property—Situs of Property.—Although Ky. Stats., 1903, Sec. 4020, provides that all real and personal estate within this State and all personal estate of persons residing in this State shall be subject to taxation, it does not include personal estate owned by persons residing in this State, but which is tangible and permanently located in other states, and employed there in the prosecution of their owner's business. Idem.....67

4. Same—Motive of Exporter.—The motive of an exporter of property to a foreign country cannot be safely inquired into for the purpose of determining whether the exportation was in good faith, or made simply to escape the payment of taxes, and this State neither has nor should attempt to exercise further jurisdiction for any purpose over exported property. Idem 67

5. Same—Nature of Property—Warehouse Receipt.—Warehouse receipts, wherever issued, and whatever they may represent, are intangible personal property, whose situs for purposes of taxation is the domicile of their owner; hence a warehouse receipt owned by a person domiciled in this State for whisky exported to a foreign country may and should be taxed here, and at such value as it may have had on the day fixed by the statute for listing property. Idem.....67

COMPROMISE—See Guardian and Ward, 4.

CONSTITUTIONAL LAW—See Legislative Districts—Municipal Corporations, 8, 10, 11.

1. Equal Protection of the Laws.—A woman is a person, and so is a corporation, within the contemplation of section 1 of the fourteenth amendment to the Federal Constitution,

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CONSTITUTIONAL LAW—Continued—
and entitled to the equal protection of the laws. Carrithers &c., v. City of Shelbyville.....769
2. Statutes—Enactment—Assent of People Affected.—Unless the Constitution so requires, no legislative act is dependent for its validity on the assent of the people whom it affects. Idem 769
3. Municipal Corporations—Annexation of New Territory.—The creation of or annexation of new territory to a town is a matter within the sole discretion of the Legislature, and does not in any manner depend on the will of a majority or any of the inhabitants living within the territory. Idem..769
4. Same.—The act of incorporating towns and enlarging or restricting their boundaries is legislative and political, and in its exercise of discretion in such matters the Legislature has plenary power. Idem.....769
5. Enlargement of Territory—Equal Protection of the Laws.—Ky. Stats., 1903, section 3483, provides that whenever it shall be deemed desirable to annex any territory to a city of the fourth class, or to reduce the boundaries thereof, the board of council shall by ordinance accurately define the boundary of the territory proposed to be annexed or stricken off, that the ordinance shall be published or posted, etc., and also provides for a protest by resident voters of the territory to be affected. Held, That the statute was not violative of the fourteenth amendment to section 1 of the Constitution of the United States by reason of the fact that some of the landholders affected might be women or corporations. Idem 769

CONTESTED ELECTIONS—See Elections.

CONTRACTS—
1. Specific Performance—Grounds of Relief—Inadequacy of Other Remedy.—The right to a decree of specific performance of a contract relating to realty or personalty is based on the fact that damages for a breach cannot be adequately compensated at law. Edelen, &c. v. Samuels & Co.....295
2. Same—Discretion of Court.—The discretion of the court in granting or refusing the remedy of specific performance of a contract is not an arbitrary, but a legal, discretion. Idem.295
3. Same—Contracts Enforcible.—A contract for the sale of the product of a distillery for five years, with the privilege of the buyer to buy the product for an additional period of five years, according to conditions specified in an instrument,

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CONTRACTS—Continued—
binding the distiller to manufacture a specified number of barrels during each distillery season, with the option of the buyer to require an additional number, and to establish and maintain a bottling room suitable for bottling in bond the product of the distillery as may be required by the buyer, etc., will not at the suit of the buyer be specifically enforced because of the difficulties of performance, and because of the adequacy of the remedy at law for damages for a breach. Idem 295

4. Validity of Assent—Fraud.—A written contract may be impeached for fraud practiced either in its execution or in its obtention. Weston M'f'g Co. v. Cotton & Long 749

5. Cancellation of Instruments—Fraud—Sufficiency of Evidence.—Fraud or mistake, to set aside a written contract, must be established by substantial and satisfactory proof. Idem 730

6. Execution—Fraud.—Where a person by ostensibly reading a contract to another obtains his signature to an agreement materially different from the reading it is a fraud which invalidates the contract. Idem.....750

7. Principal and Agent—Liability to Third Person—Fraud of Agent.—Where a principal accepts an order for goods obtained by an agent, it is bound by the agent's acts in obtaining it, although he violated the principal's instructions. Idem 750

8. Damages—Breach of Contract—Waiver.—Under a contract for the construction of a railroad, providing that, if the contractors failed to complete the work within the time specified, then all the reserved percentage due them under the contract might be retained by the railroad company as liquidated damages, the railroad company, on failure to complete the work within the time specified, ipso facto, became entitled to the reserved percentage, and its right thereto was not waived by not then terminating the contract and by allowing the contractors to complete the same. L. & N. R. R. Co. v. Mason & Hoge Co.....844

9. Same.—Though the railroad, on failure to complete the work within the time specified, had the right to retain the reserved percentage, yet it had no right to retain the stipulated percentage on work done after the time fixed for performance. Idem.....844

10. Breach—Right to Rescind—Waiver.—Where the construction of a railroad was not completed within the time specified in the contract, but the contractors continued the work, with

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CONTRACTS—Continued—
the consent of the railroad company, the railroad thereby waived its right to rescind the contract, and was bound to pay for the work at the contract price, and the contractors were bound to complete the work within a reasonable time, failing in which they would be liable for actual damages thereby sustained. Idem.....844

CONVEYANCES—See Guardian and Ward, 4.

CORPORATE STOCK—See Taxation, 8, 9.

CORPORATIONS—
Foreign Corporations—Business Within State—Appointment of Agent.—A foreign corporation sold a press to a purchaser in Kentucky, and, he having failed to pay for it, an attorney recovered judgment and bought in the press thereunder for the corporation, and afterward sold the press at private sale. Thereafter the corporation appointed a sales agent within the State, but he transacted no business under such appointment. Held, That the corporation had not carried on business within the State without appointing an agent and filing certain notices with the Secretary of State, as required by Ky. Stats. 1903, section 571. Comlth. v. Chattanooga Imp. & M'f'g. Co. 636

COSTS—
Stay of Subsequent Action Until Payment.—Under Ky. St. 1903, sec. 884, authorizing a resident poor person to prosecute an action without paying costs, where such a person dismissed an action without prejudice, he may maintain another action upon the same cause without paying the costs awarded against him in the former action; it not appearing the dismissal was intended to harass defendant or burden it with unnecessary costs. Hobbs v. L. & N. R. R. Co..... 1

COUNTERCLAIM—See Office and Officers, 2, 3, 4.

COURTS—See Judicial Districts.

CRIMINAL LAW—See Appeals, 3.
1. Evidence — Accomplices. — The testimony of accomplices jointly indicted is competent, although the indictment against them be not dismissed. Simpson v. Comlth.....441
2. Same—Appeal — Examination of Accomplice — Prejudice.—In

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CRIMINAL LAW—Continued—

a prosecution for homicide, an accomplice having consented to testify, the court admonished him that he was under no obligation to do so, and if he did not care to answer any question he would be protected. Defendant thereupon, in the absence of the jury, asked him several questions as to his willingness to testify and whether he had been offered or expected immunity, which questions the court refused to allow. On the witness' examination before the jury he did not avail himself of his privilege, but testified, and answered defendant's counsel that no one had suggested or promised that, if he would testify, he should be released. Held, that defendant was not prejudiced by the court's admonition of the witness, nor by the exclusion of the questions asked of him in the absence of the jury. Idem.....441

3. Same—Corrobation.—Cr. Code Prac., sec. 241, provides that conviction cannot be had on the testimony of an accomplice, unless corroborated, and the corrobation is not sufficient if it merely shows that the offense was committed and the circumstances thereof. Held, that where, in a prosecution for homicide, the only corroboration of an accomplice with reference to accused was the latter's admission to two witnesses that he was present at the house of deceased on the night prior to the time it was burned, and when deceased was killed, and his admission to another person that he (accused) knew something about it, such corrobating evidence was insufficient to sustain a conviction. Idem.....441

4. Bill of Exceptions—Right to Make Bill.—Though an appeal in a misdemeanor case is allowed only from a final judgment, yet it is not improper practice to preserve by bill of exceptions the proceedings on a trial which for any reason had been set aside, so that, after final judgment entered and appeal prosecuted therefrom, error claimed to have been committed on the previous trial could be examined, and, if permissible, corrected. Comith. v. Huber.....456

5. Same—Appeal by Commonwealth—Misdemeanor Case—Time of Appeal.—Cr. Code Prac. tit. 9, art. 2, sec. 347, provides that the court of appeals shall have appellate jurisdiction in prosecutions for misdemeanors where the fine exceeds or could exceed $50, or there is or could be a judgment of imprisonment for a period exceeding 30 days. Sec. 352, as amended by Act March 21, 1904, p. 145, c. 65, provides that a judgment on a verdict of acquittal of an offense the punishment of which is imprisonment shall not be reversed, but "in such cases" an appeal may be taken by the Common-

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CRIMINAL LAW—Continued—

wealth when important to the correct administration of the criminal law. Held, that the words "such cases" should be referred to the words "an offense the punishment of which is imprisonment," and that an appeal by the Commonwealth would lie in a misdemeanor case, even before a final judgment. Idem 456

6. Gaming—Keeping Poolroom—Evidence—Admissibility.—In a prosecution for keeping a poolroom, evidence that there was no disturbance of the peace in the place or annoyance to the neighborhood was inadmissible, being immaterial. Idem

7. Appeal—Matters Reviewable.—Under Cr. Code Prac., sec. 281, providing that decisions upon motions for new trial shall not be subject to exception, the court of appeals cannot consider any question presented to the circuit court only on motion for new trial; the granting or refusal of a new trial being within the discretion of the circuit courts in criminal cases. Idem.....457

8. Burglary—Breaking and Entering.—Where a laborer, occupying a house with the owner, while on leave of absence, obtained the key ostensibly to take away some of his clothing, but with intent to steal property therefrom, and did so enter and steal, he was guilty of violation of Ky. Stats., 1903, sec. 1162, providing that if any person shall break any dwelling house, and take anything of value, though the owner or any person may not be there, he shall be punished as therein prescribed. Young v. Comlth.....474

9. Embezzlement—What Constitutes.—An agent, with authority to collect money and retain a part for his services, is, on converting to his own use the entire amount collected, guilty of embezzlement, within Ky. Stats., 1903, section 1202, punishing any agent who shall embezzle or convert to his own use the money of his principal, though he was entitled to 15 per cent. of the amount as his commission. Comlth v. Jacobs 536

10. Jurisdiction of Offense—Liability of Offense.—Where deceased was shot in one state, and died in another, the crime was committed in the state where the shooting occurred, and the courts of that state have jurisdiction. Comlth. v. Ball, &c. 542

11. Same—Former Jeopardy—Acquittal—Direct Verdict.—Under Constitution section 13, providing that no person shall be twice put in jeopardy of life or limb for the same offense, even if a mistrial in a criminal case caused by defendant could not be relied on as former jeopardy, an actual acquittal,

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CRIMINAL LAW—Continued—
though upon improper ground raised by defense. is a former jeopardy and a bar to further prosecution. Idem.....542
12. Arrest—Without Warrant—Offenses Committed in Presence of Officer.—One using abusive language toward a constable and interfering with the performance of his duties commits in the presence of the constable offenses authorizing the constable to arrest him without warrant. Meyer v. Dunn..548
13. Same—Custody of Prisoner.—It is not illegal for a constable, arresting one without a warrant and taking him before a magistrate, to place him in the custody of the magistrate pending the disposition of the case, either by immediate trial or the fixing of a date therefor. Idem.....548
14. Same.—Where a prisoner, arrested without warrant is placed by the officer in the custody of the magistrate until he can dispose of the case, either by trial or the fixing of a date therefor, and attempts to leave the office of the magistrate, he may use reasonable means to prevent her leaving his custody. Idem 548
15. Appeal—Verdict—Conclusiveness.—A verdict on conflicting evidence is conclusive on appeal. Idem.....548
16. Arrest—Disposition of Prisoner—Statutes—Construction.—The word "forthwith," in Cr. Code Prac., sections 48, 50, requiring a magistrate before whom one is charged with an offense to proceed "forthwith" to an examination or trial, means reasonable time, determined by the facts of the case, and a prisoner brought before a magistrate and detained about an hour is not unreasonably restrained, where during that time she refused to submit to the magistrate's custody and by her conduct contributed to the delay by obstructing him in taking proper action. Idem.....548

DAMAGES—See Municipal Corporations, 2, 3—Principal and Surety, 6, 7.

DEATH BY WRONGFUL ACT—
Death—Action—Parties.—Const., section 241, provides that whenever death results from negligence or wrongful act damages may be recovered; the action, till otherwise provided by law to be prosecuted by decedent's personal representative, and till otherwise provided the recovery shall form a part of the personal estate. Ky. Stats., 1903, section 6, provides that when death results from negligent or wrongful act damages may be recovered, and the action shall be prosecuted by the personal representative. Section 4 provides that the widow

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CRIMINAL LAW—Continued—

and minor children of one killed by the careless, wanton, or malicious use of firearms or other deadly weapons may have an action therefor. Held, that the administrator of one whose death was caused by the wrongful use of firearms had a right of action therefor; deceased not being survived by widow or child, and the words "wrongful act" as used in the Constitution and statute embracing every injury that might be committed against the person, whether negligently done or not. Howard's Admr. v. Hunter.....685

DEFACTO OFFICERS—See Master and Servant, 9—Office and Officer, 6.

EASEMENTS—

Ways—Acquisition—Prescription—Evidence—Admissibility.—Where a party asserts a right by prescription to a way, and shows a continuous user thereof for more than 20 years, evidence of user by others living in the neighborhood for a time insufficient to ripen into a prescriptive right as to them is admissible to show that the community regarded the way as free, if not dedicated, to the use of persons to whom it furnished the only way of reaching a public way. Trustees Cin. Southern Ry. Co. v. Slaughter.....492

2. Same—Evidence—Findings.—A finding that a party had acquired by prescription a right of way over the land of another held justified under the facts. Idem.....492
3. Same—Presumptions—Burden of Proof.—Where a user of a right of way creates the presumption of a grant, a party assailing the right has the burden of proving that the use of the way was merely permissive. Idem.....492
4. Railroads—Right of Way—Rights Acquired—Notice of Rights of User.—A railway company acquiring for a right of way land over which individuals exercised and claimed a right of way adverse to and by recognition of the owner is chargeable with notice of the rights of the individuals. Idem...492
5. Deviation from Way.—Where no material changes were made in the location of a right of way claimed by adverse user, and the changes made were not made for the purpose of abandoning the way, they were immaterial on the issue of acquisition of a right of way by adverse user. Idem....493
6. Same—Right of Way—Rights Acquired.—A railway company acquired land for a right of way at a time when individuals exercised and claimed adversely a right of way over the same. The railway right of way was 100 feet in width, and

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EASEMENTS—Continued—
the use by the individuals of their right of way did not interfere with the operation of the railway. The individuals used their right of way for more than 20 years under a claim of right adversely to the company and its grantor. Held, that the individuals acquired by prescription a right of way as against the company. Idem.....493

ELECTIONS—See Schools and School Districts, 4, 5, 6, 7.

1. Contests—Placing Questioned Ballots with Those Counted.—The fact that the election officers did not return any of the ballots as questioned, but put them all in the box as counted, was not material on a contest of the election. Stegeman v. Cook.....114
2. Same—Effect of Lack of Objections to Ballots.—Where the election officers counted a ballot that should not have been counted, the fact that the validity of the ballot was not questioned before them does not prevent the defeated candidate from contesting it on a contest of the election. Idem 114
3. Same—Ballots—Voting for More Candidates Than There are Offices.—Under the express provisions of Ky. Stats., 1903, sec. 1471, if an elector mark more names than there are persons to be elected for the office, his ballot shall not be counted for the office. Idem.....114
4. Same—Contest—Trial—Settling a Tie Vote.—Where an election was contested and a tie was made apparent in the circuit court upon the contest, the court under the power to determine the case should have settled the tie by lot. Idem 114
5. Indictment—Formal Requisites—Caption—Omission—Effect.—Under Cr. Code Prac., sections 122-124, providing that an indictment must contain the title of the prosecution, the name of the court in which the indictment is presented, and the names of the parties, and must be direct and certain as regards the offense charged and the county in which the same was committed, and giving the form of the caption of an indictment showing the names of the parties and the court, an indictment containing in its body the averments that it was found by the grand jury of a county named, and that in the name of the Commonwealth it charged the accused with the commission of the crime described, and showing that it was committed within the county, was good, though the caption was omitted. Comlth. v. Drewry.....183
6. Same—Accusatory Part—Allegations—Sufficiency.—An indict-

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ELECTIONS—Continued—
ment charging a violation of Ky. Stats., 1903, sec. 1585a, punishing an officer of an election who shall "knowingly and wilfully" certify to an improper certificate of the election, which alleges in its accusatory part that accused "unlawfully and feloniously" certified to an improper certificate of election, is not bad, where in its body the statutory words are used. Idem 184
7. Violation of Election Laws — Indictment. — An indictment charging a violation of Ky. Stats., 1903, sec. 1585a, punishing an officer of an election who shall knowingly and wilfully certify to an improper certificate of the election which alleges that an election was held under the laws of the State, and that officers of election were appointed under and in accordance with the laws to serve as such in a designated precinct, and that accused was duly appointed to serve as clerk of election in the precinct, sufficiently states his connection as an officer with the election, without setting out when or by whom he was appointed. Idem.....184
8. Same.—An indictment charging a violation of Ky. Stats., 1903, sec. 1585a, punishing an officer of an election who shall knowingly and wilfully certify to an improper certificate of the election, which alleges the appointment of accused as clerk of an election held under the laws of the State, and that he wilfully and knowingly certified that a certain number of votes were cast at the election, when he knew that they had not been cast, sufficiently states an offense under the statute. Idem 184
9. Indictment—Requisites—Statutory and Common-Law Offenses. —Under Cr. Code Prac., sections 122-124, providing that an indictment shall contain a statement of the acts constituting the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is intended, and declaring that an indictment must be direct and certain as regards the party and offense charged and the county in which the offense was committed, an indictment charging a statutory offense must use the words of the statute or words having the same meaning, and an indictment charging a common-law offense must follow the forms of the common law. Idem.....184
10. Prosecutions—Statutes.—Ky. Stats., 1903, sec. 1591, declaring that the chapter relating to elections shall be liberally construed, so as to prevent any evasion of its prohibitions and penalties by shifts or device, though enacted to prevent persons charged with offenses against the election laws from

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ELECTIONS—Continued—

escaping punishment on technicalities and irregularities, does not abrogate the code provisions relating to the elements necessary to constitute a good indictment; but it should be read in connection with them, as illustrating the legislative intent concerning offenses against the election laws. Idem 185

11. Primary Elections—Officers — Offenses — Indictment.—Under Criminal Code Practice, section 122, subsection 2, providing that an indictment containing a statement of the act constituting the offense in ordinary and concise language shall be sufficient, an indictment alleging that accused, as judge of election at a primary election, performed his duties in such a way as to hinder the objects of the election by marking the ballots of electors, though none of them were blind nor physically disabled, states an offense denounced by Ky. Stats., 1903, sec. 1577, punishing any officer who shall perform his duty in such a way as to hinder the objects of the law, since section 1475 only authorizes an election officer to mark the ballot of an elector who is illiterate or blind or physically disabled. Comlth. v. Kaufman.....624

12. Same—Statutes—Construction.—Ky. Stats., section 1552, providing that an act denounced an offense by the law concerning elections shall be an offense in primary elections, and section 1563, declaring that the officers of primary elections shall be subject to the same limitations as officers of regular elections, and any act denounced by the general laws as an offense in case of officers of regular elections shall be an offense in case of officers of primary elections, extend section 1577, punishing election officers who shall perform their duty in such a way as to hinder the objects of the law, to officers of primary elections. Idem.....625

13. Same.—A primary election officer, who, in such a way as to hinder the object of the law, marked the ballots of electors who were not blind nor physically disabled, violated Ky. Stats. 1903, section 1577, punishing election officers who shall perform their duties in such a day as to hinder the objects of the law. Idem.....625

14. Same—Offenses—Proof.—To convict an election officer of a violation of Ky. Stats. 1903, section 1577, punishing an election officer who shall wilfully perform his duty in such a way as to hinder the objects of the law, it must appear not only that he wilfully committed the acts charged, but that they were committed with the intent to hinder the objects of the election law, and that they did so hinder, or were rea-

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ELECTIONS—Continued—

sonably calculated so to do. Idem.....625

15. Same—Marking Ballots—Statutes.—The duty of marking the ballots of illiterate, blind, and physically disabled electors must, under the express provisions of Ky. Stats. 1903, section 1475, be performed by the clerk of the election, though an accidental performance of such duty by a judge or sheriff of election does not amount to a violation of section 1577, punishing election officers who shall perform their duties in such a way as to hinder the objects of the election laws. Idem.625

16. Same—Indictment—Sufficiency.—An indictment charging a primary election officer with performing his duties in such a way as to hinder the objects of the election law, in violation of Ky. Stats., 1903, section 1577, which alleges that on a designated date the regularly constituted governing authority of a political party of the State held a primary election in the State; that for at least 40 days prior to such election the committee gave public notice thereof, etc.; that on such day accused was acting as a judge of election in an election precinct, etc.—sufficiently alleges the holding of a primary election as authorized by law. Idem.....625

EMINENT DOMAIN—See Railroads, 1, 2.

1. Condemnation Proceedings—Judgment.—Under Acts 1904, p. 313, c. 126, section 3, relating to roads and passways providing that appeals to the circuit court shall be tried de novo upon the confirmation of the report of the commissioners in the county court or the assessment of damages by that court, in the disposition of proceedings for the establishment of a private tramway over the property of another, the circuit court should enter a final judgment fixing the rights of the parties and awarding compensation, without reference to the action taken in the county court; but where the judgment of a county court defined with precision the rights of the parties, and awarded compensation to be paid before the tramway could be taken possession of, judgment of the circuit court on appeal that the appellee "is entitled to the tramroad adjudged by the C. county court, and the report of the reviewers therein is confirmed," is sufficient. Chesapeake Stone Co. v. Moreland.....656

2. Same—Right to Take Property—Public Use.—Property is not taken for a public use unless the public has some right to use and enjoy the property taken, as distinguished from the absolute control of the individual; and an individual cannot for his own use take private property of another, however

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EMINENT DOMAIN—Continued—
needful or convenient it may be, unless it is necessary to enable him to perform some public service; but, if the public has the right to use it upon the same terms as the person at whose instance it was taken, it is a public use. Idem....656
3. Same.—The fact that public interest will be promoted by a contemplated improvement will not, except in the case of mills, authorize the taking of private property, in the absence of the right on the part of the public to participate in the enjoyment of the property taken. Idem.....657
4. Same—Determination of Question as to Validity of Exercise of Power—Jurisdiction of Courts.—Whether a particular use is public or private is a question for the judiciary, and the courts have an undisputed right to determine whether the legislature has passed the limits provided by the Constitution, and that without reference to the character of the legislation enacted. Idem 657
5. Constitutional Law—Statutes — Construction—Determination of Validity.—If there is doubt as to the validity of a statute, it will be upheld; and, if it is capable of two constructions, one of which will uphold and the other destroy it, that construction will be adopted which will uphold it. Idem.....657
6. Public Use—Private Tramway.—Acts 1904, p. 311, c. 126, amending Ky. Stats., 1903, section 4348, so that land may be condemned for a private tramroad to enable one to reach railroad switches, etc., for the purpose of marketing the products of certain quarries, etc., and providing that nothing in the act should be construed so as to give any person, etc., exclusive use of such passage, but that other persons, etc., should have the right to use the same upon paying proper compensation therefor, is not unconstitutional as taking property for other than public use, since others have the absolute right to use it upon the condition stated. Idem.....657

ESTOPPEL—See Carriers, 22—Subrogation, 2.

EVIDENCE—See Carriers, 15 to 29—Criminal Law, 1, 2, 3.

EXECUTORS AND ADMINISTRATORS—See Master and Servant, 16, 17, 18.
1. Executors—Actions Against Executors—Statutory Provisions —Time to Sue—Limitations.—A proceeding by the sheriff in the county court under Ky. Stats., 1903, section 4241, to require the personal representatives of a deceased taxpayer to list property omitted from assessment, was not an action

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EXECUTORS AND ADMINISTRATORS—Continued—
within Ky. Stats., 1903, section 3847, prohibiting the bringing of any action, other than to settle the estate, against a decedent's estate within six months of the qualification of its personal representative; the proceedings being merely a manner of assessing property, and not in essence judicial. Comth ex rel Cummings, Sheriff, v. Ryan's Exr. 649

2. Same—Suits by the Commonwealth.—Statutory provisions limiting the time within which actions can be brought against the personal representatives of a decedent do not apply to the Commonwealth, unless by their express terms or their necessary implication it is clear they were meant to so apply. Idem 650

3. Limitation of Actions—Executors—Final Account—Surcharge. —Where an executrix's final account was settled December 31, 1895, a proceeding to surcharge it for misappropriation of funds by the executrix, not instituted until August 25, 1906, was barred by Stats., 1903, section 2519, providing that no action for relief for fraud or mistake shall be brought after 10 years from the perpetration of the fraud, etc. Wren's Exr. v. Wren's Extx. 704

4. Executors—Accounting—Right to Surcharge.—Where an ancestor bequeathed his entire estate to his wife, who was also his executrix, for life, the right of the executor of a remainderman to surcharge the settlement of the executrix for fraudulent misappropriation of the capital of the estate was entirely distinct from and independent of his right to proceed against the widow as life tenant. Idem 704

5. Limitation of Actions—Suspension—Statutes.—An action to surcharge the settlement of an executrix's account for fraud is not within Stats, 1903, section 2542, declaring that the provisions of the chapter shall not apply to a continuing and subsisting trust, etc., which includes only ch continuing trusts as entitled the trustee to hold the estate independent of the cestui que trust. Idem 704

6. Same—Equitable Rights—Application.—Under Ky. Stats., 1903, section 2522, providing that an action for relief not otherwise provided for can only be commenced within 10 years next after the cause of action accrued, the statutes of limitation apply to all actions, whether based on equitable or legal rights. Idem 704

7. Executors—Actions Against Executors—Statutory Provisions —Time to Sue—Limitations.—A proceeding by the sheriff in the county court under Ky. Stats., 1903, section 4241, to require the personal representative of a deceased taxpayer to

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EXECUTORS AND ADMINISTRATORS—Continued—
list property omitted from assessment, was not an action within Ky. Stats., 1903, section 3847, prohibiting the bringing of any action, other than to settle the estate, against a decedent's estate within six months of the qualificaion of its personal representative; the proceeding being merely a manner of assessing property, and not in essence judicial. Comth. ex rel Cummings v. Ryan 649
8. Same—Suits by the Commonwealth.—Statutory provisions limiting the time within which actions can be brought against the personal representatives of a decedent do not apply to the Commonwealth, unless by their express terms or their necessary implication it is clear they were meant to so apply. Idem 649

EXEMPTIONS—See Executors and Administrators, 6, 7.

EXPORTS—See Executors and Administrators, 6, 7.

FIRE INSURANCE—
1. Venue—Adjustment of Loss Under Insurance Policy—Action on Award of Arbitrators.—An action on an award of arbitrators appointed as provided in a fire policy may be brought in the county where the award was made and the property situated, though the policy was made elsewhere. German Ins. Co. v. Hazard Bank 730
2. Contracts—Rights of Election—Notice.—A party to a contract who has the right to make an election thereunder, on giving notice thereof to the other party, must, on exercising the right, give such notice as will leave no doubt of an intention to exercise such right. Idem 730
3. Election to Rebuild—Notice.—The election of an insurer to rebuild must, to be available as a defense on the policy, be clear, and must be carried out within a reasonable time. Idem 730
4. Same.—A notice by an insurer entitled under the policy to rebuild, which recites that it will exercise its right to rebuild, unless insured will accept a cash offer as a compromise, is insufficient, because it undertakes to use the privilege of rebuilding as a means of forcing the insured to accept a compromise. Idem 730
5. Same.—Where an insurer failed to give proper notice of its intention to elect to repair, as authorized by the policy, the insured, after the expiration of the time in which the notice could be given, could repair. Idem 730

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FIRE INSURANCE—Continued—

6. Same — Adjustment of Loss—Award—Validity.—An umpire, selected by appraisers appointed to determine the loss under a fire policy, notified the appraisers that he would only act on condition that he could call in an expert builder to advise him as to the amount of the loss. He advised with a carpenter who viewed the premises at his request. Held, That the act of the umpire did not invalidate the award founded on his own judgment. Idem 730
7. Same.—Under a fire policy providing for the appointment of appraisers who shall select an umpire who shall act with them in matters of differences, and declaring that the award of any two of them shall be binding, an award made by the umpire and one of the two appraisers is binding, though made in the absence of the other. Idem 730

FORMER JEOPARDY—See Criminal Law, 11.

FRANCHISES—See Municipal Corporations, 13, 14, 15, 16—Master and Servant, 5—Taxation, 4.

FRAUD—See Contracts, 1, 2, 3—Life Insurance, 8.

GIFTS—

1. Gift—Inter Vivos—Requisites.—In a gift inter vivos the donor must not only part with possession of the property, but with dominion over it; it being unconditional and irrevocable. McCoy's Admr. v. McCoy 783
2. Same—Causa Mortis.—A gift causa mortis is one by a sick person, who, apprehending his dissolution, delivers or causes to be delivered to another the possession of any personal goods to keep as his own in case of the donor's death, and it only takes effect in case the donor dies, being conditional and revocable by the donor at any time. Idem.....783
3 Same—Delivery—Evidence.—Evidence that decedent told defendant to go to the cupboard and get a bank pass-book that was there, and that on his bringing it she handed it back to him, saying, "This is yours," requesting him to pay her debts and not squander it, contained all the elements necessary to show a complete delivery, whether it was treated as a gift inter vivos or causa mortis. Idem 784
4. Same—Subject of Gift—Money in Bank.—There may be a gift of money on deposit in a bank by the delivery of the pass-book, whether it be a savings bank or an ordinary deposit bank. Idem 784

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GIFTS—Continued—

5. Same—Evidence.—On the issue as to whether or not there was a gift of money on deposit in a bank, evidence that previous to the gift the donor had expressed an intention to leave the property to the donee was admissible. Idem....784
6. Appeal—Review—Question of Fact—Conflicting Evidence.—Where the testimony is conflicting, it is the province of the jury to weigh and determine its sufficiency. Idem.....784

GUARDIAN AND WARD—

1. Actions—Parties—Allowance of Guardian's Compensation.—Where, after a suit was instituted by a guardian, the ward became of age and was joined as a plaintiff, the guardian was properly allowed to remain a party to the action and have his compensation for services as guardian allowed therein. Trustees Speers' Memo. Hospital v. Makibbin's Guardian 17
2. Wills—Construction—Estate in Trust—Capital and Income.—A testatrix bequeathed to her adopted daughter "a sum of money sufficient for her support and education until she maries or arrives at the age of 21 years * * * and I direct my executors * * * to set apart out of my estate * * * $10,000 for that purpose. Any balance that may remain of said fund after the execution of said purpose shall become a part of my general estate." Held, That the executors were not confined to the income of the fund, but were authorized to use the entire fund for the support and education of the ward. Idem 17
3. Compensation—Payment.—Where compensation was promised a guardian by the executors before his services incident to the education and maintenance of the ward were performed, it was proper to order its payment out of the fund provided for the ward's support and education. Idem 17
4. Care of Ward's Estate—Compromise—Conveyance of Land.—Under Ky. Stats., 1903, section 2030, providing that a guardian, with leave of the court, may compromise any controversy concerning the lands of his ward, when the interest of the ward will be subserved thereby, where a suit to determine the interest of wards is compromised, the court has authority to order a conveyance of the interest conceded by the compromise to be in the wards and to be conveyed for a money consideration under its terms. Skidmore, etc., v. Cumb. Valley Land Co., etc. 576

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Homesteads—Husband and Wife.

HOMESTEADS—

Right of Widow and Children.—Under Ky. Stats., 1903, section 1707, providing that a homestead shall be for the use of the widow, so long as she occupies it, and of the unmarried children of the deceased husband till the youngest is of age, but said land may be sold, subject to the right of the widow and children, if necessary to pay decedent's debts, the widow and children are entitled to such homestead as deceased, if living, could have claimed under sections 1702, 1703, 1705, so that, the homestead right being an indivisible property of greater value than $1,000, the whole property may be sold for decedent's debts, and $1,000 of the proceeds be set aside for the use of the widow and children for such time as they would be entitled to use of a homestead. Warren's Admr. v. Warren, etc. 692

HUSBAND AND WIFE—

1. Separate Estate of Wife—Liability as Surety—Evidence.—Kentucky Statutes, 1903, section 2127, provides that no part of a married woman's estate shall be subjected to the payment or satisfaction of any liability on a contract made after marriage to answer for the debt, default or misdoing of another, including her husband, unless such estate shall have been set apart for that purpose by deed, mortgage, or other conveyance. Held, That where a note signed by defendants, husband and wife, did not disclose which of the parties was principal or surety, it was competent for the wife to show by parol or other evidence that she was only a surety. Black v. McCarley's Exr. 825
2. Same.—There being no evidence to establish that the wife received the proceeds of the note, and there being evidence that the proceeds were paid solely to the husband, a prima facie case was made out in her behalf. Idem.....825
3. Principal and Surety—Married Women.—Whether a married woman is surety on a note or other instrument is to be determined by the evidence, and controlled by the principles applicable to principals and sureties generally. Idem....825
4. Witnesses—Transactions with Deceased Persons.—Civil Code Prac., section 606, provides that a party can not testify for himself concerning any verbal statement or, of any transaction with, or any act done or omitted to be done by, one who is dead when the testimony is offered. Held, That where, in an action by the executor of the payee of a note signed by a husband and wife, the wife alleged that she was merely surety on the note, it was not competent for her to

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HUSBAND AND WIFE—Continued—
testify that she did not sign the note, nor received the proceeds thereof, or as to what disposition was made of the money. Idem 825

INDICTMENTS—See Criminal Law—Elections—Railroads.

INJUNCTIONS—See Mineral Waters.

INTERSTATE COMMERCE—See Intoxicating Liquors, 7, 12, 13, 14.

INTOXICATING LIQUORS—See Licenses—Municipal Corporations.

1. Local Option—Submission to Popular Vote—Contest—Appeal—Supersedeas—Operation and Effect.—An election under the local option law was held in a city in which the sale of intoxicating liquor had previously been prohibited. The election resulted in favor of the sale of liquor. A contest of the election was dismissed by the contest board and an appeal taken to the circuit court, which declared the election void. After the contest board had dismissed the contest, and before the appeal was prosecuted to the circuit court, the city issued a license to retail liquors. The judgment of the circuit court declaring the election void was superseded, and an appeal taken to the court of appeals. Held, That the supersedeas which suspended the efficacy of the judgment left affairs in the same condition they were just before the judgment was rendered, and the privilege of the licensees to conduct their business under the license was not interfered with during the life of the license or until the appeal was disposed of. Comth. v. Weisenberg, etc. 8
2. Same—Local Option—Election—Statutory Provisions.—Ky. Stats., 1903, section 2556, provides that after a local option election the canvassing board shall cetrify the result to the clerk of the county court, the judge shall have it spread on the order book of his court, and it shall be prima facie evidence in any proceeding under the act. Section 2557 provides that after the entry of the certificate, if the vote was against the sale, etc., of liquors, it shall be unlawful to sell the same. Section 2566 provides that, when notice of a contest of the election shall be executed on the county judge, the certificate shall not be recorded. Held, That where an election was had in a territory in which the sale of intoxicating liquors had previously been prohibited, resulting in

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INTOXICATING LIQUORS—Continued—
favor of the sale, but a contest was had, and the certificate was not recorded, the city authorities had no authority to issue a license to sell intoxicating liquors, since, the election having changed the status of the teritory, it was necessary that the certificate be recorded in order that the election might become effective. Idem 3
3. Local Option Election—Time of Holding.—Under Ky. Stats., 1903, section 2555, providing that local option elections shall not be held within thirty days next preceding or following any regular political election, the day of the latter election is to be included. Newton, etc., v. Ogden, etc. 101
4. Local Option Election—Costs.—Ky. Stats., 1903, section 1540, provides that the cost of all elections held in any county shall be paid by the county treasurer, except as otherwise provided by law. Section 2555, regulating local option elections, provides that on an order by the county clerk for an election it shall be the duty of the sheirff to have the order published in a newspaper, and to advertise the same by printed or written handbills, and tha., if the proprietor of the newspaper refuses to publish the notice, the bills shall be sufficient. Section 2559 provides that the court shall not make the order until the persons signing the petition have deposited with the county judge an amount sufficient to pay for printing or posting advertisements as provided for, and the fees of the clerk making entries in the order book. Held, That the petitioners should be required to deposit a sum sufficient to pay, not only for the printing of the bills, but for the publication. Butler v. Fiscal Court 146
5. Same.—Where the publisher of a newspaper publishes a notice, though the county judge has not required a deposit sufficient to cover the publication and other expenses, the cost of publication can not be recovered from the county or the petitioners. Idem 146
6. Sales—Persons Liable.—Under Ky. Stats., 1903, section 2572, providing that the person in possession of premises on which liquor is sold in violation of law shall be fined, etc., a railroad company can not be fined for permitting an express company, having its office in the railroad company's building, to deliver whiskey and collect money for it, where the express company was authorized by law so to do. L. & N. R. R. v. Comth. 279
7. Same—Prosecution—Evidence.—Ky. Stats., 1903, section 2572, provides that the person in possession of premises on which liquor is sold in violation of law shall be subject to fine, etc.

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INTOXICATING LIQUORS—Continued—
Held, That proof that an express company having an office in the building owned by defendant railroad company, delivered whiskey which had not been ordered and collected money for it, in a county where the local option law was in force, while showing a sale there of the whiskey, was not conclusive, defendant being entitled to show that the transaction was one of interstate commerce, conducted according to the usual course of business, and that the express company in delivering the whiskey and collecting the money for it acted in good faith, without knowing or having reasonable grounds to believe that the package it delivered contained whiskey or had not been ordered, in which event defendant would not be guilty. Idem 279

8. Same—Good Faith.—Ky. Stats., 1903, section 2572, provides that the person in possession of premises on which liquor is sold in violation of law shall be fined, etc. Held, in a prosecution against a railroad company for permitting an express company having an office in defendant's building to sell liquor in violation of law, the Commonwealth should not be confined on the question of the good faith of the express company in acting in ignorance of the fact that the package delivered by it contained whiskey, etc., to proof of the one transaction named in the indictmentfi but should be allowed to show the manner in which the business of the office was conducted, and such other facts as are competent under the rules of evidence, where the question of intent or good faith is involved. Idem 279

9. Courts—Previous Decisions by United States Supreme Court—Effect in State Court—Interstate Commerce.—In a prosecution under Ky. Stats., 1903, section 2572, providing that the person in possession of premises on which liquor is sold in violation of law shall be fined, etc., where an interstate shipment is involved, the rules laid down by the United States Supreme Court must control. Idem 289

10. Sales in Prohibited Quantities.—A sale of liquor to several or any one of certain witnesses, in such manner that they or any one of them were enabled to receive a quantity of less than five gallons, is not a violation of the act of April 15, 1884 (1 Acts 1883-84, p. 1404, c. 789), and of the acts amendatory thereof, regulating the sale of intoxicating liquor in the counties of Knox and Whitley, and forbidding a sale of less than five gallons, unless the liquor was so sold with the knowledge, understanding, or design that it would be so received. Farris v. Comth. 463

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INTOXICATING LIQUORS—Continued—

11. Same—Criminal Prosecutions—Instructions.—Where, on a trial for selling liquor in quantities less than five gallons, it appeared that several parties met near defendant's residence and agreed to buy whiskey, each to share therein according as he contributed, that the whisky was purchased, and, within view of defendant's house, divided among such parties, an instruction that, if defendant had a scheme whereby he, in selling liquor under the guise of selling it in five gallons, arranged to divide it among his purchasers so that they could get it in less quantities than five gallons, and so that such purchasers received their part of the liquor less than five gallons in a way commonly known as a "divide," he was guilty, was subject to the criticism that it did not sufficiently connect the purchasers or any one of them with the transaction. Idem 463
12. Same.—Act April 15, 1884 (1 Acts 1883-84, p. 1404, c. 789), and acts amendatory thereof, regulating the sale of intoxicating liquor in the counties of Knox and Whitley, does not restrict the right of a distiller to sell in five-gallon quantities to licensed retailers or wholesalers. Idem 463
13. Offenses—Transportation.—Where a carrier received in another State intoxicating liquor consigned to a person in this State, and delivered the same to him in a county where the local option law prevailed, its act was within Acts 1906, p. 320, c. 63, declaring it unlawful for a common carrier to bring into or deliver in any county, etc., where the sale of intoxicating liquor is prohibited, any intoxicating liquor. Cin., N. O. & T. P. Ry. Co. v. Comth. 563
14. Commerce—Interstate Commerce—Regulation by States.—Under the provision of the Constitution of the United States that Congress shall have power to regulate commerce among the several States, Acts 1906, p. 320, c. 63, which undertake to impede, burden, or regulate the bringing of intoxicating liquors by carriers into the State, is unconstitutional and void. Idem 564
15. Same.—That liquor was taken from a point in Kentucky to a point outside the State, and from there shipped back to a consignee in Kentucky, for the purpose of evading the local option law of Kentucky, did not as against the carrier render such shipment subject to State regulation, as not being interstate commerce. Idem 564
16. Same.—Whether a carrier knew that the commodity presented for transportation from one State to another was malt liquor, or that the point to which shipped was in a local

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INTOXICATING LIQUORS—Continued—
opt.on district, is immaterial as affecting the liability of such shipment to the State regulation. Idem 564

JUDICIAL DISTRICTS—
1. Statutes—Title and Subject—Germane Provisions.—Session Acts 1906, p. 12, ch. 4, is entitled "An Act to create the thirty-third judicial district of Kentucky and to change the twenty-sixth, twenty-seventh and twenty-eighth circuit court judicial districts of Kentucky, and to provide for the holding of courts in the said twenty-sixth, twenty-seventh, twenty-eighth and thirty-third districts, and to provide for judges and Commonwealth's attorneys for same." Held, That as all the provisions of the act related to the establishment of the thirty-third judicial district and recited the changes in the other districts necessary to its creation the act contained but one subject, and its provisions, other than those for the appointment of the judge and Commonwealth's attorney, were germane to the title, so that the act was not in violation of Constitution section 51, declaring that no law shall relate to more than one subject, which shall be expressed in its title, etc. Brown v. Moss, Circuit Judge 833
2. Same—Effect of Partial Invalidity—Separate Provisions.—That part of Sess. Acts 1906, p. 12, ch. 4, creating the thirty-third judicial district, which authorized the Governor to appoint the judge and prosecuting attorney in a newly created district until the regular election in 1909, even if invalid, was separable from the other provisions, and therefore did not affect the validity of the act as a whole. Idem 833
3. Courts—Judicial Districts — Creation — Statutes.—Sess. Acts 1906, p. 12, ch. 4, creating the thirty-third judicial district, being for the establishment of a new district, was not in contravention of Constitution section 134, providing that the judicial districts shall not be changed except at the first session after an enumeration, unless on the establishment of a new district. Idem 833
4. Same—Constitutional Provisions—Construction.—Constitution section 128, provides that the Legislature at its first session after the adoption of the Constitution shall divide the State into judicial districts, and that in making the apportionment no county shall be divided, and the number of districts excluding those in counties having a population of 150,000, shall not exceed one district for each 60,000 of the population of the entire State. Section 132 declares that the General Assembly may establish additional districts, but that

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JUDICIAL DISTRICTS—Continued—
the whole number of districts, exclusive of counties having a population of 150,000, shall not exceed at any time one for every 60,000 of population of the State according to the last enumeration. Held, That the number of districts authorized is to be determined by dividing the population of the entire State by 60,000, and not by dividing the population of the State less the population of the only county having a population of more than 150,000 by 60,000. Idem 833

5. Same—"Population of the State."—The phrase "population of the entire State," as used in Constitution section 128, providing that in making apportionment of judicial districts the number shall not exceed one district for each 60,000 of the population of the entire State, means all of the State's inhabitants. Idem 833

JUDGMENTS—See Appeals, 1—Schools and School Districts, 1.

1. Bar—Splitting Cause of Action—Taxation.—The omission of property from assessment in a given year gives rise to a single cause of action, and where an action has been brought to have the property assessed, and a judgment has been rendered therein, the judgment is conclusive as to all parties, and an action can not afterwards be brought to assess other property omitted from the same assessment which was not embraced in the first action.—Comth. ex rel Alexander v. Bacon. 30

2. Bar to Claim—Availability.—A judgment, in an action to settle an estate, which distributes a part thereof to a judgment debtor, can not be pleaded as a defense to an action by the creditor to enforce the judgment against the debtor's distributive share; the two judgments being in nowise antagonistic. Clark v. Raison, Jr., for Use, etc. 486

3. Process — Warning Order — Requisites. — A warning order against non-resident defendants, husband and wife, which recites, "The defendant," followed by the husband's name, followed by the abbreviation, "etc.," without mentioning the name of the wife, "warned to appear," etc., is void as to the wife, and she is not brought into court thereby. Idem....486

4. Set-off—Against Assigned Judgment.—Under Civil Code Prac., section 19, providing that an assignment of a thing in action shall be without prejudice to any set-off, and section 96, subsection 2, authorizing a set-off in an action on a judgment, a claim of a judgment debtor against the judgment creditor, which arose before the assignment of the judgment, is a

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JUDGMENTS—Continued—
lawful set-off against the judgment in the hands of the assignee. Idem 486

JURIES—
1. Jury—Impaneling.—Ky. Stats., 1903, sections 2241-2244, relate to the selection and impaneling of juries, and were re-enacted by Sess. Acts, 1906, p. 519, c. 156, with certain alterations, which made service on a regular jury within a year previous a new ground of challenge, and provided for a drawing in open court by the judge of the names of jurors from the jury wheel. Held, That the amendment which went into effect June 11, 1906, did not annul the selection of existing juries drawn under the statute before amendment, though such parts of the amended statute as required no further time to put them into operation, such as the right to challenge a juror on the ground that he had served on a regular panel within a year previous, became fully effective on June 11, 1906. Eichman's Com. v. South Cov. & Cin. Street Ry. Co. 519
2. Same—Challenges to Panel—Practice.—Challenges to the panel should precede poll challenges. Idem 519
3. Same—Objections—Waiver.—Unless seasonably made, objections to the panel, as well as to the polls, are deemed waived. Idem 519

JURISDICTION—See Eminent Domain, 4—Criminal Law, 10, 11.

LANDS—See Eminent Domain.
Public Lands—Lands Subject to Patent.—Ky. Stats., 1903, section 4702, provides that each county in the State shall have the right to dispose of the unappropriated lands therein not otherwise provided for in the manner thereinafter directed. Section 4703 provides that an actual settler on any vacant or unappropriated land shall have a pre-emption right not exceeding 200 acres, and that any person wishing to appropriate any vacant land may obtain an order of court authorizing him to enter and survey not exceeding such amount. Section 3704 provides that the surveyor shall survey the entries, etc., bounding them by plainly marked trees, stones or stakes, and noting where they bind on a water course or a marked line of another survey. The boundary of the State extends to the northern shore of the Ohio river at low-water mark. Held, That the taking up of land in the bed of the Ohio river

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LANDS—Continued—
between the thread of the stream and the northern shore was unauthorized. Ware v. Hager, Auditor 324

LANDLORD AND TENANT—
Lease of Wall by Tenant for Advertising Purpose—Necessity for Landlord's Consent.—Under Ky. Stats., 1903, section 2292, providing that, unless the landlord consents in writing, a transfer by a tenant for a term less than two years of any interest in the premises shall forfeit the lease, a lease by such a tenant of a wall for advertising purposes, without the landlord's consent, was void as to the landlord; and, the painting of a sign upon the wall by the sublessee being unlawful, the sublessee is liable to the landlord for his damages. Louisville Gunning System v. Parks 532

LEGISLATIVE DISTRICTS—
Legislature—Apportioning Membership — Constitutional Law.—The apportionment of the State into senatorial districts under Act June 28, 1893 (Laws 1893, p. 1204, c. 235), having been accepted for thirteen years without its validity being questioned, the constitutionality of the act may not be questioned on the ground that the act infringes Constitution section 6, providing that "all elections shall be free and equal," and section 31, requiring an apportionment as nearly equal as may be of senatorial districts. Adams, etc., v. Bosworth.. 61

LICENSES—See Municipal Corporations, 17.
1. Occupation Tax—Grocers—Uniformity.—Under Constitution section 181, allowing license taxes on trades, occupations, etc., and Ky. Stats., 1903, section 3058, subsection 2, authorizing cities of the second class to tax grocers, etc., the tax must apply to all grocers in a city; and hence an ordinance levying a tax on grocers only who employ delivery wagons is invalid. City of Covington v. Dalheim, etc..... 26
2. Same—Vehicles.—Ky. Stats., 1903, section 3058, subsection 2, authorizing cities of the second class to license and tax cabs, wagons, etc., and "all other vehicles used or let for hire," does not authorize a city to tax delivery wagons used by grocers. Idem. 26
3. Hack Lines—What Constitutes.—That defendant's hacks or other similar vehicles regularly met railway trains at a station, and for hire transported passengers in that town, was not the operation of a hack line, within the revenue law of March 15, 1906 (Acts 1906, p. 200), requiring the payment of

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LICENSES—Continued—
a license to run a hack line. Comth. v. Walton.....523
4. Statutes—Rules of Construction—Purpose of Act.—If a reason can be discovered for a particular construction of a statute, especially of a revenue statute, which construction would deprive the treasury of revenue, such construction will be discarded in favor of one that will apply uniformly to all persons engaged in the same calling, and so as to raise revenue. Comth. v. Nunan 698
5. Intoxicating Liquors—Licenses—Statutory Provisions—Construction of Act.—Acts 1906, p. 193, chapter 22, subdivision 4, requiring licenses from wholesale liquor dealers, provides that "For each agency in this State established by resident brewers or resident wholesale dealers in domestic beers or malt liquors, * * * a license fee shall be paid." Held, That the fee is required to be paid not only for each agency in the State established by resident brewers, but must also be paid by each resident wholesale dealer in domestic beers or malt liquors. Idem 698
6. Same.—Acts 1906, p. 193, chapter 22, subdivision 4, taxing certain occupations, does not include in the general provision enumerating the taxable occupations that of resident wholesale dealer in domestic beers or malt liquors, but it is included in the specific description in a later section. Held, That the general description yields to the specific one, and the latter section extends the former so as to include such occupation. Idem 698

LIFE INSURANCE—
1. Life Policy—Misrepresentations—Evidence—Question for jury.—In an action on a life policy, defended on the ground that the insured had misrepresented the extent of his use of intoxicants evidence held to support a finding that his representations were substantially true and insufficient to defeat a recovery. Metropolitan Life Ins. Co. v. Ford..... 49
2. Same.—An insurer issuing a life policy has the right to inform itself of the habits of the insured with respect to the use of intoxicants, and he must truthfully give the information asked; but, unless his representations are substantially untrue, they are not misrepresentations precluding recovery on the policy. Idem 50
3. Same—Application for Other Insurance—Rejection—Misrepresentations—Evidence.—An insurer defending an action on a life policy on the ground that the insured falsely stated that an application to another insurer for insurance had not been

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LIFE INSURANCE—Continued—
rejected has the burden of proving that the rejection was made known to the insured before he applied for the policy sued on; there being no rejection until knowledge of it was received by the insured. Idem 50
4. Same—Presumption.—In the absence of proof that an insured knew of the rejection of his application for other insurance at the time he applied to an insurer, it will be presumed in an action on a policy issued by the latter that his answer in the application that applications for other insurance had not been rejected was true. Idem 50
5. Same—Misrepresentations—Evidence.—An applicant for a life policy stated in his application that applications for other insurance had not been rejected. The application was dated July 18th. He had applied for other insurance and the medical examiner on July 3d made a report thereon, rejecting the risk. It was not shown when the rejection was ordered made by the insurer, or that the applicant was notified thereof. Held to authorize a finding that the applicant did not have knowledge of the rejection of his application for other insurance, and that his statements were not misrepresentations sufficient to defeat a recovery on the policy. Idem.. 50
6. Same—Evidence—Instructions.—Where, in an action on a life policy, defended on the ground that insured had in his application falsely stated that applications for other insurance had not been rejected, the evidence showed that an application for other insurance had been rejected fifteen days before the date of the application, but did not show that he had been notified of the rejection prior to the making of the application, an instruction that the representations in the application as to there having been no refusal of insurance did not prevent a recovery, unless insured had knowledge of such refusal when the application for the policy sued on was signed properly submitted the issue. Idem 50
7. New Trial—Grounds—Cumulative Evidence.—A new trial after verdict on the ground of newly discovered evidence was properly denied; the evidence being as to a point litigated and cumulative. Idem 51
8. Contracts—Legality—Fraud—Parties in Pari Delicto.—Where a life policy void as against public policy because the beneficiary has no insurable interest in the life of insured, so that no one is entitled to recover on it, was issued on insured's fraudulent statement in the application that the beneficiary was his creditor to the amount of the policy, and the insurance was paid to the beneficiary, insured's adminis-

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Life Insurance.

LIFE INSURANCE—Continued—
trator can not recover it of the beneficiary, on the ground that he holds it as trustee for him; insured and the beneficiary having both participated in the fraud, and there being nothing, outside the fact that he could not write, to show that insured was imposed upon or deceived. Howe's Exr. v. Griffin's Admr. 373

9. Insurance — Mutual Insurance Companies — Surplus — Lapsed Policy.—The "surplus" of a mutual life insurance company belongs equitably to the policy holders who contributed to it in the proportion in which they contributed to it. Under section 88, c. 690, p. 1869, Laws 1892, of New York, the share of a policy lapsed for non-payment of premium (after having been in force three years) must be applied to the purchase of extended insurance unless the policy holder has elected to take paid-up insurance therefor. U. S. Life Ins. Co. v. Spinks. 405

10. Same—Extended Insurance.—The words "dividend additions" as used in the New York statute refer to that part of the premiums charged which was "loaded" on to the premium in excess of its share of expenses and losses sustained. Such additions, and the earnings thereon, which constitute the "surplus," must be valued and applied in buying extended insurance for lapsed policies in force three years or longer, in the same way that the "reserve of the policy is required to be valued and applied in purchasing such extended insurance. Idem 405

11. Same—Valuing Surplus.—Insurance companies must keep accurate accounts with their policy holders as classes, failing which, no presumption will be indulged in the companies' favor when it comes to valuing and applying "surplus" or "dividend additions" to lapsing policies. Idem 405

12. Same—Dividends.—It is not optional with the directorate of life insurance companies not purely stock companies, whether they will declare dividends, or to what etxent, of the so-called surplus. Idem 405

(Syllabus by the court.)

On rehearing June 26, 1907.

13. Insurance — Liability of Insurer — Life Insurance——Extended insurance—Dividend Additions.—Laws of New York 1892, p. 1969, c. 690, section 88, requiring the application of the reserve, on a policy lapsed after being in force three full years, to the payment for extended insurance, and providing that "reserve" should include "dividend additions," meant that the surplus on a lapsed policy, as well as the reserve

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LIFE INSURANCE—Continued—
thereon, should be applied in purchasing extended insurance in case of lapse after a policy was in force three years, though the words "dividend additions" may have meant in a technical sense, in life insurance, additions on account of surplus to the face of a policy, payable at death while the insurance was in force. Idem 406

LIQUOR DEALERS—See Principal and Surety, 1 to 7.

LIMITATION—See Executors and Administrators, 2, 3, 4, 5, 6, 7, 8.

LOCAL OPTION—See Intoxicating Liquors.

MALFEASANCE—See Office and Officer, 4.

MASTER AND SERVANT—See Railroads—Carriers.
1. Injuries to Servant—Actions—Evidence.—In an action against a railroad for the death of a locomotive engineer, evidence examined, and held to warrant the refusal of a peremptory instruction for the defendant. Ill. Cent. Ry. Co. v. Sheegog's Admr. 252
2. Death—Punitive Damages—Grounds—Gross Negligence.—Under Constitution section 241, providing for a right of action for the death of a person caused by negligent or wrongful act, and the express provisions of Ky. Stats., 1903, ch. 1, section 6, where a railroad was guilty of gross negligence in running a defectively equipped train over an unsafe track at a high rate of speed, it was proper to submit to the jury the question of punitive damages. Idem 252
3. Removal of Causes—Proceedings—Duty of Courts.—Where a petition is filed for the removal of a case to the Federal court, it is the duty of the judge of the State court to determine from the petition and record, whether or not there is presented a Federal case, and, if so, he should remove it to the Federal court, and that court should hear the proof on the jurisdictional facts, and determine whether the State or Federal court has jurisdiction. Idem 253
4. Statutes—Pleading Private Acts.—Civil Code Prac., section 119, provides that, "in pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law." Held, That a petition for the removal of a case to the Federal court was defective, which did note state the title of a private statute, nor its contents, but merely the petitioner's conclusions as to its contents.

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MASTER AND SERVANT—Continued—
Idem 253
5. Leases—Liability of Lessor.—Under Constitution section 203, providing that no corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or lessee, contracted or incurred in the operation of the franchise, or any of its privileges, a railroad which had received a franchise from the State could not by lease exempt itself from responsibility for the torts of itself and lessee. Idem 253
6. Same—Liability of Lessor to Lessee's Servant.—While the lessor of a railroad is not liable to the employes of the lessee for torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased property, it is liable to them for an injury resulting from the negligent omission of a duty owed to the public, such as the proper construction of the road. Idem 253
7. Statutes—Expression of Subject in Title—Act Relating to Courts.—Acts 1906, p. 249, c. 23, is entitled an act to amend Ky. Stats., 1903, section 964, by addition thereto subsection "a," called section 964a. The added section authorizes a special term of court to be held in another county of a judicial district when a regular term is being held within the district, and an additional section, designated as "subsection 2, declares that the regular judge shall have the right when engaged in holding any regular or special term of court in any county to cause an appointment of a special judge under the act to hold any regular or special term of the circuit court then about to be holden in any other county in such judicial district. Held, That the whole amendment, including the subsection, applied to the same subject, and that the amendment was not therefore invalid, as containing matter not expressed in the title. Idem 591
8. Same—Partial Invalidity.—Such subsection 2 (section 2522), even if invalid, as not within the title, is separable, and does not affect the validity of the first section of the amendment. Idem 591
9. Judges—Appointment—De Facto Judge—Objections—Waiver.—Where a special term at which a case was tried was regularly called by the circuit judge, and no objection was made to the assignment of the case for trial at that term, and no exception was taken to the action of the court in trying the case, the judge who presided was at least a de facto officer, and defendant could not thereafter object to the validity of his appointment. Idem 591

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MASTER AND SERVANT—Continued—

10. Nature of Relation.—The relation of master and servant is created by contract, and imposes reciprocal rights, duties, and obligations. L. & N. R. R. Co. v. Pendleton's Admr..605
11. Same—Duty to Furnish Safe Appliances and Place for Work. —It is the duty of the master to provide reasonably safe premises and appliances for the servant's use. Idem....605
12. Negligence—Care Required as to Trespassers.—A trespasser, or volunteer, who is injured, can not recover from the owner of the premises, unless the injury is inflicted after his peril is discovered. Idem 605
13. Injuries to Servant—Deviation from Regular Employment.— Where a person employed by a railroad as car inspector voluntarily undertook without authority, the work of assisting a switching crew, the relation of master and servant was temporarily suspended. Idem 605
14. Same—Creation of Relation—Implied Contract.—The mere knowledge and implied consent of an agent in charge of railroad yards, who saw an employe of the company leave his regular employment as car inspector and assist a switching crew, did not create by implication of law the relation of master and servant between the employe and the company while he was engaged in that work. Idem. 605
15. Railroad — Death of Brakeman—Negligence—Rules. — Decedent, a brakeman in defendant's employ, was directed to assist in taking cars from a siding, and while between two cars, standing six or eight feet apart, inspecting the coupling air hose, was killed by other cars being shoved against one of the standing cars with great force, and without notice to decedent. Held, That defendant was negligent in permitting such operation, notwithstanding an unpublished rule or custom of the company that the switch engine had the right of way over all others in the yard, and that it was not the duty of those in charge of it to give notice of its movements to other crews in the yard, who were required to protect themselves. L. & N. R. R. Co. v. Herndon's Admr.....589
16. Administrators—Public Administrator—Appointment—Corporations.—Under Ky. Stats., 1903, section 457, providing that the word "person" may extend and be applied to corporations, the court was authorized by section 3903, providing for the appointment of some discreet, fit person to act as public administrator, to appoint a corporation to that office, which was organized under section 606, providing that such corporations are authorized to act as guardian, executor or administrator. Idem 590

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MASTER AND SERVANT—Continued—

17. —Same—Right to Sue.—Where an action for death was brought by a corporation which had been appointed public administrator, and the petition, in addition, alleged that intestate died a resident of H. county, Ky., and that on a specified day plaintiff was appointed by the county court administrator of his estate, and thereupon qualified as such administrator as required by law, and had acted as such ever since, etc., such allegation sufficiently showed a special appointment of plaintiff as administrator of decedent's estate. Idem...590

18. Same—Qualification.—An allegation that plaintiff had duly qualified as intestate's administrator raised a presumption that plaintiff had taken the necessary oath. Idem.....590

19. Pleading—Capacity to Sue—Demurrer.—Civil Code Prac., section 92, provides that a special demurrer is an objection to a pleading which shows that the court has no jurisdiction of the defendant or of the subject of the action, or that plaintiff has no legal capacity to sue, and that such grounds of objection are waived unless specified by demurrer thereto, except the objection to the jurisdiction of the court over the subject of the action. Held, That a general demurrer to a petition by an administrator for wrongful death was insufficient to raise the objection that it had not sufficient capacity to sue. Idem 590

20. Courts—Special Judges—Constitutional Provisions.—Constitution section 136, declaring that the General Assembly shall provide by law for holding circuit court whenever for any cause the judge shall fail to attend, or can not properly preside, authorizes the General Assembly to provide for a special judge in the case named, and does not limit its right to provide for special judges in other emergencies, and was therefore not violated by Acts 1906, p. 249, c. 23, amending Ky. Stats., 1903, section 964, authorizing the holding of a special term in another county of a judicial district while a regular term was being held in a county of the same district. Idem 590

MEASURE OF DAMAGES—See Railroads, 6, 7.

MINERAL WATERS—

Subterranean Flow — Diversion — Injunction — Adequacy of Legal Remedy. — An owner of land who opened a street and acquiesced in the act of the Legisltaure establishing a town owns the soil of the street sub-

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MINERAL WATERS—Continued—
ject to the public easement to use the street for municipal purposes, and he may enjoin the town from putting down a well in the street to strike the vein of mineral water supplying a well on his land, not for the purpose of obtaining water merely, but to supply the mineral water free to all, the attempt of the town, being an attempt to take the owner's property for public use, without compensation, and a judgment for damages affording inadequate relief. Hamby v. City Dawson Springs 451

MINES AND MINERALS—See Mineral Waters.

MISCONDUCT OF COUNSEL—See Sales, 6.

MISTAKE OF LAW—See Office and Officer, 1.

MUNICIPAL CORPORATIONS—See Criminal Law, 3, 4, 5.
1. Town Marshals—Liability on Bond—Acts Colore Officii.—Ky. Stats., 1903, section 3690, requires a town marshal to execute a bond under which for any lawful arrest or assault on any person in making an arrest, he and his sureties shall be liable to the person so injured. By section 4, Ky. Stats., the widow of any person killed by the wanton or malicious use of firearms may have an action against the person doing the killing. Held, That where a marshal arrested a person for a misdemeanor, and then unnecessarily and maliciously killed the arrested person while under arrest, his widow might maintain an action on the bond. Growbarger, etc., v. U. S. Fidelity & Guaranty Co., etc. 118
2. Amount of Liability.—Ky. Stats., 1903, section 3752, having provided that in an action on such a bond the recovery against the principal and surety shall not be limited to the penalty in the bond, the amount of plaintiff's recovery was not limited to the penalty. Idem 118
3. Same—Damages.—While plaintiff might recover punitive damages against the principal in the bond, only compensatory damages could be recovered of the surety. Idem.....119
4. Same—Pleading—Petition.—In an action on a marshal's bond, though the petition admitted that the authorities of the town had made no record showing an aceptance of the bond, it having alleged in substance that the bond was required of the marshal by the council, that it was duly executed, and that it was duly approved and accepted by the town council, and, in addition, an attested copy of the bond, obtained of the

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MUNICIPAL CORPORATIONS—Continued—
proper authorities of the town, having been filed with and made a part of the petition, as against a demurer, there was a sufficient showing of acceptance. Idem 119
5. Police Power—Regulating Hitching of Horses in Streets.—A town has a right, in the exercise of its police power, to pass an ordinance forbidding persons from leaving horses hitched or unhitched in the streets or alleys of the town. Wells v. Town of Mt. Olivet 131
6. Same—City Council—Place of Meeting—Failure to Designate by Ordinance.—Ky. Stats., section 3696, provides that "all meetings shall be held within the corporate limits of the town at such place as may be designated by ordinance, and shall be public." Held, That, where the trustees had not adopted an ordinance fixing a place of meeting, the members might assemble at some convenient and accessible place within the corporate limits of the town. Idem 131
7. Same—Governmental Powers—Discretion as to Exercise.—Under the powers granted boards of trustees of towns of the sixth class by Ky. Stats., 1903, section 3704, providing for the passage of ordinances and police regulations, they are invested with a large discretion relating to the adoption of ordinances, and the courts will sustain them, unless it affirmatively appears that they are unreasonable or violative of the statutes or Constitution. Idem 131
8. Same—Ordinances—Reasonableness.—Where an ordinance is not inherently defective as violating the Constitution or statutes, a person attacking it upon the ground that it is illegal, unfair, unreasonable, or oppressive must affirmatively show that as applied to him it is unreasonable, unfair, or oppressive. Idem 131
9. Police Power—Fire Ordinance.—The police power of a municipality to enact ordinances for the safety of the public, etc., includes the right to enact reasonable ordinances, rules and regulations to prevent the spread of fires and for the protection of property within the corporate limits. Tilford, Bldg. Inspector, v. Belknap 244
10. Same—Delegation of Governmental Power.—A municipal ordinance providing that no frame building shall be erected, moved or remodeled within the city until the owner, architect or agent shall have obtained permission in writing from all parties owning permanent brick or stone structures within a radius of sixty feet of the proposed structure, was unconstitutional, as a delegation of governmental power to private citizens. Idem 244

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MUNICIPAL CORPORATIONS—Continued—

11. Constitutional Law—Due Process of Law—Equal Protection of Law.—Such ordinance was also unconstitutional as depriving the owners of frame structures of the equal protection of the laws and of their property without due process of law. Idem 244

12. Ordinances—Reasonableness.—A municipal ordinance prohibiting the erection, removal or remodeling of a frame building within sixty feet of a brick or stone structure without the consent of the owner of the latter was void for unreasonableness. Idem 244

13. Franchises—Authority to Grant—Sale.—Under Constitution section 164, providing that a city may sell franchises at public sale to the highest and best bidder for a term not exceeding 20 years, a city has no power to grant a franchise without offering the same at public sale. Moberly v. Richmond Telp. Company 369

14. Same—Conditions.—A city may annex any lawful condition to the exercise of a franchise granted to a public service corporation, which condition becomes a part of the contract under which it is thenceforth used. Idem.....369

15. Same—Telephones—Regulation of Rates.—Where a city granted a franchise for the operation of a telephone line, it was competent to provide as a condition that the rates for service to citizens should not exceed a schedule fixed in the ordinance, or any future ordinance properly adopted. Idem.369

16. —Telephones—Franchise—Limitation of Charges—Construction.—Where an ordinance granting a telephone company a franchise to operate within a city prescribed that the company should not charge toll in excess of a schedule contained in the ordinance, such schedule was limited to service within the city, and did not preclude the corporation from charging an extra rate for connections outside the city limits. Idem 370

17. Intoxicating Liquors—License Tax—Ordinances.—An ordinance fixing a license tax for the sale of intoxicants is not invalid for failing to specify the purpose for which the tax is levied. City Mt. Sterling v. King 526

18. Council—Special Meetings—Ordinances.—Since, except in legislation involving contract rights, legislative bodies are independent of their predecessors, and may amend or repeal existing laws at pleasure, and since Ky. Stats., 1903, section 3502, authorizes special meetings of councils in fourth class cities, and councils may do anything at special meetings they may do at regular meetings, an ordinance of such a city,

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MUNICIPAL CORPORATIONS—Continued—
providing no ordinance or by-law shall be amended except at a regular meeting, is invalid. Idem 526
19. Special Charter—Implied Repeal.—The legislation for the incorporation and government of, cities of the first class adopted pursuant to Constitution, 1891, sections 166, 167, requiring the General Assembly to provide by general laws for the government of cities, etc., is in lieu of existing legislation on the subject, and repeals by implication a special charter given to a city of the first class. Parsons v. Breed..759
20. Same—Officers—Public Works—Chief Engineer.—Ky. Stats., 1903, section 2810, providing that each executive board of cities of the first class may appoint a chief of each department under its control, and empowering the board of public works to appoint a chief engineer, adopted in obedience to Constitution, 1891, sections 166, 167, requiring the General Assembly to provide by general laws for the government of cities, etc., repeals the special charter of Louisville, creating the office of principal engineer, providing for the manner of filling it, and its term. Parsons v. Breed 759
21. Same—Removal of Engineer.—The office of chief engineer is created by Ky. Stats., 1903, section 2810, empowering the board of public works in cities of the first class to appoint a chief engineer, and the officer is a chief of a department under the control of the board of public works, and removable by it without notice and without cause. Idem.....759
22. Officers—Tenure—Removal.—Where neither the Constitution nor the statutes fix the term of office, the appointee holds at the pleasure of the appointing power, though it attempts to fix a definite term. Idem 759
23. Board of Public Works—Chief Engineer—Term of Office.—The board of public works of a city of the first class, created by Ky. Stats., 1903, section 2824, and empowered by section 2810 to appoint a chief engineer, has no power to appoint a chief engineer for a fixed term, but he is removable at the pleasure of the board. Idem 759

NEGLIGENCE—See Death by Wrongful Act—Master and Servant, 11, 12, 13—Railroads, 13, 21.

NEW TRIALS—See Criminal Law, 7—Sales, 5.
1. Newly discovered Evidence — Cumulative Evidence. — In an action against a railway company for the death of a pedestrian at a crossing, a witness testified that she saw him near the crossing, and then went into the house, and shortly

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NEW TRIALS—Continued—

the train passed. Another witness testified that he saw the pedestrian, that he stopped and looked up and down the track, and that the witness walked about 8 or 10 feet, when the train rushed by. Held, that the evidence of the latter witness was merely cumulative, and not indispensable to recovery by plaintiff, and a new trial on the ground of newly discovered evidence that the latter witness' testimony was false was properly refused. L. & N. R. R. Co. v. Ueltschi's Admr. 556

2. Same.—A new trial will not be granted to enable the defeated party to introduce new evidence, unless the reasons why it should be done are strong, and it is made to appear with reasonable certainty that injustice will result unless the relief is granted. Idem.....556

3. Appeal—Effect as to Motion for New Trial.—Where, pending an appeal by a party against whom a judgment has been rendered, he discovers within the time allowed by law a cause for opening the judgment in the lower court, he will not be denied the right to do so because he is prosecuting an appeal. Idem 556

NON-RESIDENTS—See Taxation, 3, 5.

NUISANCE—See Railroads 11, 12, 15, 16, 17.

OCCUPATION TAX—See Licenses.

OFFICE AND OFFICERS — See Appeals, 3 — Municipal Corporations, 1, 2, 3, 4, 20, 21, 22, 23.

1. States—Officers—Recovery of Money Paid Under Mistake of Law.—Where an agent of the Auditor of State gave his whole time in good faith to the collection of license fees due the State, pursuant to the direction of the Auditor, and the State received the benefit of the work and expenses and paid a just compensation for the services rendered, the State could not recover the sum paid on the ground that it was paid under a mistake of law, without accounting to the agent for the expenses and services rendered. Comith. v. Barker.....200

2. Same—Actions—Counterclaim.—A defendant in an action by the State may maintain a counterclaim, though an action against the State will not lie, for the reason that a citizen cannot sue the State without its consent. Idem.....200

3. Pleading—Counterclaim.—A counterclaim is an independent action, and every allegation necessary to constitute an independent action is necessary to constitute a good counterclaim. Idem 200

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OFFICE AND OFFICER—Continued—

4. Appeal — Remand — New Trial — Counterclaim.—A defendant may set up a counterclaim after a judgment in his favor has been reversed on appeal and the cause remanded for new trial. Idem 200

5. Offenses—Usurpation of Office.—Defendant was not guilty of usurpation of office within Ky. Stats., 1903, sec. 1364, making it an offense for any person to hold any office after his election thereto shall have been declared illegal by a court of competent jurisdiction, or to usurp any office established by law, where, though his election to the office of road supervisor was not legal, he was put into it by the fiscal court, and, though he retained possession and exercised the duties of the office after the fiscal court had declared the office vacant, there had never been a judicial determination that the election was illegal by a court of competent jurisdiction. Eubank v. Comlth.....348

6. Officers—De Facto Officers—Acting Under Invalid Election.—A person assuming the duties of supervisor of roads, by virtue of a void election by the fiscal court, and discharging the duties of the office with the acquiescence of the court, even after the office had been declared vacant and another supervisor elected, is an officer de facto. Henry, &c. v. Comlth. 357

7. Counties—County Board—Criminal Responsibility of Members.—The members of a county fiscal court, in allowing the claim of a de facto supervisor of roads against the county acted in a judicial or quasi judicial capacity, and were not criminally liable for an error of judgment, departure from sound policy or an act contrary to law, where they acted honestly and with good motives.

ORDINANCES—See Municipal Corporations.

PARTY WALLS—

Liability of Adjoining Owner for Use.—A person who uses a wall erected on the dividing line by the owner of an adjacent lot, should pay a reasonable and fair price for the use thereof estimated as of the time the user takes place, even though neither he nor his vendor was a party to the erection of the wall, and made no agreement, express or implied, concerning it. Spaulding, &c. v. Grundy.....510

PERPETUITIES—See Wills, 6.

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PLEADING—See Carriers, 19—Master and Servant, 4—Railroads, 4.

POLICE POWER—See Railroads, 14, 15, 16, 17.

POOL RIOMS—See Criminal Law, 6.

PRESCRIPTION—See Easements, 1, 2.

PRESUMPTIONS—See Easements, 3.

PRIMARY ELECTION—See Election.

PRINCIPAL AND SURETY—See Husband and Wife, 1, 2, 3, 4.

1. Action on Bond—Defense by Surety—Conclusiveness of Judgment Against Principal.—Sureties on a liquor dealer's bond are not estopped, in an action thereon, from showing that their principal had not violated the law, even though in penal proceedings against him he confessed his guilt, or was convicted of the offense. City of Paducah v. Jones.....809
2. Intoxicating Liquors — Bonds of Dealers — Actions on — Sufficiency of Evidence.—In a suit by the city on a bond conditioned that the principal will conduct his liquor business in a legal manner, evidence examined, and held to warrant the finding that the clerk who made the illicit sales was acting entirely for himself and that his acts were never ratified by the principal. Idem.....809
3. Same—Admissibility of Evidence.—In an action by the city on a bond conditioned that the principal will conduct his liquor business in a legal manner, evidence showing that the principal's clerk, who illicitly sold on Sunday, had sold liquor with the knowledge of the principal on previous Sundays, is admissible, since it tends to show whether or not the selling on the Sunday in question was within the scope of the clerk's employment or by the consent of the principal. Idem 809
4. Same—Offenses—Wrongful Acts of Agent—Employer's Liability.—An employer, irrespective of his instructions or directions may be proceeded against criminally for the act of his clerk or agent, who, within the scope of his employment, sells or furnishes liquor in violation of law. Idem.....810
5. Same—Ordinance—Power to Enact—Requirement of Bond.—Under Ky. Stats., 1903, section 3058, giving city councils the right to license, tax, and regulate the sale of liquor, the Paducah council had the power to pass an ordinance requiring an applicant for a liquor license to execute a $1,000 bond.

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PRINCIPAL AND AGENT—Continued—
with good sureties thereon, conditioned that the applicant will conduct his liquor business in a legal manner, since the requirement is reasonable and proper, and has a tendency to compel an observance of the law. Idem.....810
6. Same—Actions on Bond—Defenses.—In an action by the city on a bond conditioned that the principal will conduct his liquor business in a legal manner, the amount of damages created by the violation of law does not enter into the case, since, if the conditions of the bond have been broken, the sureties are liable for the sum stipulated therein. Idem..810
7. Same.—In such an action, payment of the fine imposed upon the principal in criminal proceedings for the violation of law will not satisfy the bond. Idem.....810

QUESTION FOR JURY—See Carriers, 13, 14 17—Gifts, 6—Life Insurance, 1—Railroads, 21—Telegraphs, 1.

RAILROADS—See Carriers—Master and Servant.
1. Eminent Domain — Compensation — Taking of Entire Tract.—The inconvenience resulting from the loss of a home and in moving is not a proper element of damage in a condemnation proceeding by a railroad company. Madisonville H. & E. R. R. Co. v. Ross.....138
2. Same.—Under Ky. Stats., 1903, section 839, relating to condemnation proceedings by railroad companies, providing that either party may appeal to the circuit court by executing bond as in other cases, and that upon payment to the owner of damages and costs a railroad company may take possession of the land, but, when an appeal is taken, it shall not be entitled to take possession until it shall have paid into court the damages assessed and all costs; payment of damages and costs into court is not an abandonment of an appeal from the decision of the circuit court. Idem.....138
3. Fires—Contributory negligence.—The owner of land adjoining a railroad violates no duty to it by allowing his land to grow up with grass, weeds or brush. L. & N. R. R. Co. v. Beeler 328
4. Pleading—Facts or Evidence.—In an action against a railroad company for negligently burning plaintiff's orchard, defendant was not required to plead that its engines were screened, as required by Ky. Stats., 1903, sections 782, 790; such fact being mere evidence relevant to the question of defendant's negligence. Idem 328
5. Fires—Question for Jury.—In an action against a railroad for burning plaintiff's orchard, evidence held sufficient to require

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RAILROADS—Continued—
the denial of a peremptory instruction for defendant. Idem 328
6. Same—Damages—Excessiveness.—Plaintiff's orchard containing 800 or 900 trees, was injured by fire negligently set out by defendant railroad company. One of defendant's witnesses testified that the damage amounted to $2.50 a tree. Soon after the burning the railroad company had two persons assess the damage, who found it to amount to $2,461, though there was other proof for defendant placing the amount considerably lower. Held, that a verdict for $2,000 was not excessive. Idem.....328
7. Same—Measure of Damages.—In an action against a railroad company for injuries to plaintiff's orchard by fire, the measure of damages was the reasonable value of the trees destroyed and the difference in value of those injured before and after the injury, and not the difference in value of the whole farm before and after the fire. Idem.....329
8. Appeal—Exclusion of Evidence—Prejudice.—Where, in an action against a railroad for injury to plaintiff's orchard by fire, the difference in the evidence with reference to the damages in the end lay in the fact that some of the witnesses placed a lower value on the fruit trees than others, defendant was not prejudiced by the court's erroneous exclusion of evidence as to the value of the entire farm before and after the injury, as a circumstance bearing on the value of the trees destroyed and injured. Idem.....329
9. Fencing Right of Way.—The duty of a railroad company under Ky. Stats., 1903, section 1790, to construct a fence half the distance of the division line between the right of way and the land of an adjoining owner, when the landowner has constructed a fence for the other half, is limited by sections 1791, 1792, 1795, 1784, so that the land must be improved, or, if unimproved, must be inclosed on the other three sides, and the company must be notified in writing to construct its fence; which facts must appear in a complaint based on failure to construct such fence. Parrish v. L. & N. R. R. Co. 633
10. Same—Construction of Cattle Guards.—Under Ky. Stats., 1903, section 1793, providing that a railroad company shall construct cattle guards at terminal points of fencing constructed along its line, except at points where such line is not required to be fenced on both sides, and at public crossings, it cannot be required to erect cattle guards except at points where under the fencing law the construction of fencing may be required, nor till such fencing has been erected. Idem..633

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RAILROADS—Continued—

11. Operation — Regulations—Violations—Indictment.—An indictment charging a railroad company with running its trains through an incorporated town at an unreasonable rate of speed and without the customary warning signal charges a public nuisance. Cin. N. O. & T. P. Ry. Co. v. Comith.....712
12. Same.—To find a railroad company guilty of committing a public nuisance by running its trains through an incorporated town at an unsafe rate of speed without signals at a crossing therein, it is necessary, not only to prove an habitual rapid running of the trains, but also that such running was without necessary warnings to avoid injuring those using the crossing. Idem.....712
13. Same—Negligence.—The rapid running of a train over the streets or crossings of a town, which will render unavailing signals that may have been given of its approach, is evidence of negligence, entitling a person injured thereby to recover damages. Idem.....712
14. Same—Municipal Corporations—Police Power—Regulation of Trains.—Ky. Stats., 1903, section 786, requiring every railroad company to sound the whistle and ring the bell outside of incorporated cities at least 50 rods from a crossing, and to give such signals in cities as the legislative authorities thereof may require, confers on municipalities the exclusive power to determine by ordinance what signals shall be given therein by trains running through their corporate limits, whether on the streets or crossings. Idem.....712
15. Same.—Under Ky. Stats., 1903, section 3074, authorizing towns of the sixth class to enact police regulation not conflicting with the general laws, a town of the sixth class may require a railroad company to use such reasonable precautions as to the speed of its trains in approaching a crossing or passing through its limits as may be needful for the safety of the public. Idem 713
16. Same—Evidence—Admissibility.—Where, on a trial of a railroad company for committing a public nuisance by running its trains through an incorporated town at an unsafe speed without giving warning at public crossings, the evidence showed that it stationed a watchman at a crossing, it was proper, as bearing on its good faith, to show that it placed the watchman there pursuant to a requirement of the railroad commissioners, though the commissioners exceeded their authority. Idem 713
17. Same—Evidence—Sufficiency.—On a trial of a railroad company for committing a public nuisance by running its trains through an incorporated town at an unsafe speed without

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RAILROADS—Continued—
giving warning at a crossing, evidence held to require an acquittal, though the trains were run at an unreasonable rate of speed. Idem 713
18. Actions for Injuries on Tracks—Negligence—Questions for Jury.—In an action against a railway company for the negligent killing of plaintiff's intestate while on defendant's track, evidence considered, and held sufficinet to go to the jury. Rader's Admx. v. L. & N. R. R. Co.....722
19. Operation—Care Required as to Trespassers.—Failure of those in charge of a train to give warning of a railroad train passing through a city or town or approaching a crossing is negligence of the greatest degree, and such failure will render the company liable for injury caused, even to a trespasser. Idem 722
20. Railroad company is liable for an injury done to a trespasser, as well as to a person lawfully upon its track, if his peril was, or by the exercise of that character and degree of care required in operating railroad trains might have been, discovered in time to prevent or avoid injury to him. Idem 722
21. Same—Actions for Injuries—Negligence—Questions for Jury.—Where a railroad company has knowledge of a trespasser or licensee on its tracks or notice of their expected and probable presence, the rate of speed may be negligent as to them, and whether it is negligence is a question for the jury. Idem 722

REPLEVIN—
1. Redelivery Bonds—Liabilities.—Civil Code Practice, section 388, provides that in replevin, if the property had been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for the return of the property or its value if the return can not be had and damages for the taking and withholding the same. Held, That, where a plaintiff suing for the possession of property gave a bond to secure the performance of the judgment and was given possession of the property, if defendant neglected on obtaining a judgment to have the damages for the withholding of the property determined in that action, he is barred of any action therefor on the replevin bond. Mounts v. Murphy 803
2. Same — Actions — Right of Actions.—Where plaintiff gave a bond to perform the judgment of the court and obtain possession of the cattle, and the defendant secured judgment for the return of the cattle, or, if this could not be had, for

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REPLEVIN—Continued—
their value when taken, and the cattle were so injured when returned as to be reduced in value, the defendant may recover in an action on the bond for the difference in the value of the cattle when received and when returned. Idem.....803

RIGHT OF WAY—See Easements, 4, 5, 6—Eminent Domain.

REMOVAL OF CAUSES—See Master and Servant, 3, 4.

SALES—
1. Warranties—Right of Action.—A warranty is a matter of contract, and strangers to the contract have no right of action upon it. Berger v. Standard Oil Co.....155
2 Negligence—Dangerous Substances—Liability of Manufacturer. —Where a manufacturer or seller of an article is negligent in its composition or sale, so that injury results not to the vandee, but to a stranger, the general rule is that the seller is not liable unless either the article is an imminently dangerous one, or the seller has knowledge of its defects, and that they are such as to endanger life or property of one who has no notice of the defects. Idem.....155
3. Same — Knowledge by Manufacturer of Defect. — An action against a manufacturer of an article which is so defective as to endanger life or property of one who has no notice of the defect by a person other than the vendee, is founded on deceit, and the scienter must be laid as to the deceit to support it. Idem 155
4. Same—Precautions Against Injury.—In an action against a manufacturer of defective lubricating oil by another than the vendee thereof for injuries caused by its explosion, there could be no recovery if the injured person could, by the exercise of ordinary care, have learned of the defective quality of the oil so as to have prevented his injury from its use. Idem 155
5. New Trial — Grounds — Newly Discovered Evidence.—That a witness who would testify to a fact germane to the issues was not discovered until after the trial is not ground for a new trial, when it appears that he, or others to prove the same fact, might with ordinary diligence have been discovered before the trial. Idem 155
6. Trial—Argument of Counsel—Matters Immaterial to Issues.— In an action against the manufacturer of defective lubricating oil for injury caused therefrom, it was not error for the court to exclude remarks of counsel in his argument as

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SALES—Continued—
to what he had thought and done in regard to having the oil analyzed. Idem 155

SET OFF—See Judgments, 4.

STATUTES, CODE AND CONSTITUTION CITED AND CONSTRUED.

Kentucky Statutes: Page

Section 4—Actions 123
Section 6—Actions 92, 265, 689
Section 186—Licenses 719
Section 439—Process 488
Section 457—Construction of Statutes 600
Section 459—Construction of Statutes 541
Section 469—Construction of Statutes 651
Section 474—Contracts 485
Section 571—Corporations 636
Section 606, 611—Corporations 599
Section 782—Corporations 331
Section 785—Corporations 182
Section 786—Corporations 719
Section 790—Corporations 332
Section 836—Corporations 143
Section 839—Corporations 144
Section 884—Costs 5
Section 964 964a—Courts 602, 603
Section 1141—Crimes and Punishments..... 10
Section 1202—Crimes and Punishments.....537
Section 1471—Elections 116
Section 1475—Elections 629, 633
Section 1540—Elections 150
Section 1552—Elections 631
Section 1577—Elections 629
Section 1585a—Elections 189
Section 1591—Elections 193
Section 1596a subsec. 5—Elections 117
Section 1792, 1707—Homesteads 694
Section 1726—Sheriffs 693
Section 1789, 1795—Railroads 641, 642
Section 2030—Guardian and Ward 579
Section 2066—Heirs and Devisees 316
Section 2127—Husband and Wife.....829
Section 2241, 2244—Juries 521
Section 2522—Limitation 710
Section 2543—Limitation 709

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Statutes Code and Constitution Cited, &c.

STATUTES, CODE AND CONSTITUTION, &c.—Continued—
Section 2555—Local Option 102, 148
Section 2556, 2557, 2566, 2559—Local Option..... 14, 148
Section 2572—Intoxicating Liquors 280, 285
Section 2721—Wills 666
Section 2810—Municipal Corporations 763
Section 2824—Municipal Corporations 766
Section 2984a—Municipal Corporations 165
Section 3058—Municipal Corporations 813
Section 3449—Municipal Corporations 48
Section 3483—Municipal Corporations 771
Section 3502—Municipal Corporations 529
Section 3690—Municipal Corporations 127
Section 3696—Municipal Corporations 134
Section 3704—Municipal Corporations 135, 720
Section 3748—Office and Officers.....745
Section 3251, 3752—Office and Officer.....122, 127
Section 3839, 3847, 3849—Personal Representatives.....654
Section 3847—Personal Representatives 650
Section 4020—Revenue and Taxation.....72, 111, 214
Section 4022—Revenue and Taxation 214
Section 4023, 4064—Revenue and Taxation.....651
Section 4053—Revenue and Taxation.....651
Section 4085—Revenue and Taxation.....673
Section 4129, 4131, 4147—Revenue and Taxation.....796
Section 4120—Revenue and Taxation.....651
Section 4160—Revenue and Taxation.....652
Section 4241—Revenue and Taxation.....78, 653
Section 4313, 4344—Roads and Passways 360
Section 4348—Roads and Passways 662
Section 4427, 4437—Schools 197, 199
Section 4401—Schools 39
Section 4702, 4704—Treasury Warrants 327
Section 4825, 4839—Wills 92
Civil Code—
Section 19— 485, 490
Section 29— 471
Section 92— 601
Section 96— 490
Section 119— 269
Section 184— 804
Section 214, 269— 472
Section 366— 484
Section 483— 37
Section 486, 487— 38

Digitized by Google

STATUTES, &c.—Continued—
Section 606— 831
Section 619— 6
Section 734, 748, 759— 571, 572
Criminal Code—
Section 122— 350, 631
Section 124— 189
Section 136— 190
Section 281— 460
Section 335, 339, 352 459
Section 348, 349 742
Kentucky Constitution—
Section 13— 545
Section 48, 50— 553
Section 51— 603, 838
Section 59, 159 778
Section 61— 152
Section 128— 840
Section 132— 839
Section 136— 602
Section 164— 372
Section 170— 392
Section 181— 167
Section 227— 745
Section 241— 92, 265, 687

SCHOOLS AND SCHOOL DISTRICTS—

1. Creation of New Districts.—Under Ky. Stats., 1903, section 4427, providing that the boundary of a school district can not be changed, unless notice in writing shall be given to the trustees of the districts to be affected, and section 4437, creating the trustees of school districts a body politic and corporate, with authority to contract in their name as trustees, etc., a notice by a county superintendent of his purpose to make a new district out of territory included in existing districts, directed to the trustees of the districts affected, and served on the chairman of the respective trustees, was sufficient. Gividen, County Supt., v. Trustees School District No. 54 194
2. Same—Decision of School Officers—Review.—The determination of the cases of extreme emergency within Ky. Stats., 1903, section 4428, providing that no school district established shall include less than forty-five pupil children, except in cases of extreme emergency, is confided, in the first instance, to the county superintendent, who acts judicially, and,

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SCHOOLS AND SCHOOL DISTRICTS—Continued—
in case he errs, an appeal may be prosecuted to the superintendent of public instruction, and when these officials have determined that an extreme emergency exists, the courts can not interfere unless the power to act did not exist for want of notice required by section 4427, or unless the power was manifestly abused. Idem 194

3. Same.—Ky. Stats., 1903, section 4428, prohibits the establishment of school districts including less than forty-five pupil children. The county superintendent of a county created a new school district out of territory included within three existing districts. One of the existing districts had a school population of over eighty, and after the change it had forty-three pupil children within the district and three children of a resident of the district, who were outside of the district. Held, That, as the domicile of the children was prima facie the domicile of the parent, the three children must be included in the census of the district, and thereby make the number of pupil children in the district more than forty-five. Idem 195

4. Judgment — Conclusiveness — Election Contest. — A decision against an election contestant does not conclude him from asserting the contestee's ineligibility in a subsequent action to recover the office, where the Supreme Court on appeal in the contest refused to pass on that question. Wilson v. Tye. 34

5. Officer—Usurpers—Action to Remove—Why May Maintain.—Under Civil Code Praction, section 483, authorizing the Commonwealth or a person entitled to an office to prevent usurpation by an action, section 484, requiring the Commonwealth's attorney to bring the action against a usurper of a county office, if no other person be entitled thereto, etc., and section 487, providing that on the removal of a usurper the person adjudged entitled thereto shall be placed in possession, if the action be instituted by him—one in possession of an office, though a usurper, may not be removed at the suit of another claimant unless such claimant shows himself entitled to the office. Idem 34

6. Same — County Superintendent — Tenure. — Under Kentucky Statutes, 1903, section 4401, fixing the tenure of the county superintendent of common schools until his successor is elected and qualified, and providing, in case of contest, the superintendent of public instruction may recognize one of the contestants as the officer until the contest is settled,

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SCHOOLS AND SCHOOL DISTRICTS—Continued—
the courts having decided contestee was elected over contestant and she having qualified, the State superintendent having recognized her right to the office, and contestant having surrendered the official records to her, he was excluded from the office and may not sue to remove her from office, though she be ineligible. Idem.....34

SLANDER—
1. Absolute Privilege—Judicial Proceedings.—A witness while testifying under oath in a court of justice is not subject to prosecution for slander for any statement that he may make upon the subject under consideration. Sebree v. Thompson 223
2. Same—Question of Law.—Whether words otherwise actionable as defamatory are privileged is a question of law for the decision of the court, depending upon the circumstances of their utterance or publication. Idem 223

SPECIAL JUDGE—See Carirers, 20.

STATUTES—See Judicial Districts—Master and Servant, 78.

STREET IMPROVEMENT—
1. Paved Streets—"Reconstruction"—"Repair."—Where, after a street which had been paved with asphalt at the expense of abutting owners had fallen into disrepair, the city passed an ordinance directing that it be reconstructed with asphalt pavement in accordance with the ordinance, in so far as it related to resurfacing streets with asphalt paving, so that the entire improvement consisted merely of relaying a new three-inch asphalt surface on the original macadam base, without disturbing the same, the work did not constitute a reconstruction of the street, but was a mere repair thereof, for which the city was solely responsible. City of Covington, etc., v. Bullock, etc. 236
2. Statutory Provisions.—Ky. Stats., 1903, section 3449, authorizes the common council of cities of the third class to pass ordinances requiring the improvement of streets and alleys by grading, etc., any portion thereof, not less in length than one block, etc. Held, That, where property is so situated that it is impracticable to divide the territory including it into squares or blocks, or lay off streets or alleys, the council may, nevertheless, order the improvement of the sidewalks, curbing, etc., providing the improvements are not less in

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STREET IMPROVEMENT—Continued—

length than an ordinary block. Board of Council of Frankfort v. Brislan 477

3. Same—Block—What Constitutes—How Determined.—Ky. Stats., 1903, section 3449, authorizes the common council of a city of the third class to pass ordinances requiring the improvement of streets and alleys by grading, etc., any portion thereof not less in length than one block. Held, That, in the absence of a statutory definition of what constitutes a block, its length is a question of fact to be determined from the evidence. Idem 478

4. Pleading—Judgment on Pleadings—Submission—Consent that Answer be Taken as True.—Under Civil Code Prac., section 366, providing that plaintiff shall be entitled to a trial in an equitable action at the first term after the summons has been served, etc., if no issue of fact be made by the pleadings, or if plaintiff consent that the statements of the answer may be taken as true, the averments of an answer will not be taken as true unless plaintiff consents in terms that they shall be so taken, and a motion by plaintiff to submit does not have this effect. Idem 478

5. Action to Enforce Lien—Counterclaim—Damages.—In an action by a city to enforce a lien on defendant's lands for street improvements, consisting of a sidewalk, etc., a counterclaim setting up that in constructing the improvements the contractor did not, as required by the ordinance, make the same in front of the defendant's land, but entered thereon and constructed the sidewalk entirely on the land, encroaching thereon for the purpose, and thereby damaging defendant's property, etc., presented a good defense and entitled defendant to prove damage, if any, to his property by reason of the taking and injury complained of. Idem.....478

SUBROGATION—

1. Payment of Debt—Rights of Surety.—Plaintiff's testatrix and her husband sold certain land by title bond, taking several notes in payment of the price, with F. as surety. On the day after the notes were executed, F. paid testatrix the amount of the first two notes, which were thereupon assigned to him without recourse, and F. thereafter sold the notes to defendants. Nothing more was ever paid on the remaining notes, and testatrix sued to recover the amount thereof, and to subject the land to the payment of the judgment. Held, under the rule, that subrogation can not be invoked until full satisfaction of the original creditor's debt, defendants were not

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SUBROGATION—Continued—
subrogated to testatrix's rights as to the notes so assigned for the purpose of having them declared a prior lien on the land to the testatrix's remaining notes unpaid. McClure's Exr. v. King, etc. 675
2. Estoppel—Representations.—Under the rule that, in order to work an estoppel, the representations relied on must be plain and positive, and such as would mislead a person of ordinary prudence, testatrix was not estopped to claim a prior lien on certain land for the payment of purchase-money notes, because her husband, acting as her agent, stated to defendants that the first two notes which had been paid by the surety thereon and assigned to him, and were about to be transferred to defendants, "were all right." Idem 675

SUPERSEDEAS—See Appeals, 2,3.

SURETIES—See Municipal Corporations, 3—Subrogation, 1—Principal and Surety.

TAXATION—See Commerce—Executors and Administrators, 6, 7—Judgments, 1.
1. Municipal Property.—A city's fire apparatus, electric light plant, poles, wires, a house and lot, and other property used for public purposes, are not liable for State and county taxes. Comth. v. City Paducah 77
2. Same—Assessment.—In a proceeding under the express terms of Ky. Stats., 1903, section 4241, for the assessment for taxes of omitted property, on the Commonwealth's appeal from the county court's holding that none of the property was taxable, the circuit court properly refused to assess the portion it held liable to taxation; its certificate that that portion was liable being sufficient to warrant the county judge in assessing it. Idem 77
3. Personal Property of Non-resident.—Where a non-resident establishes a business in the State and manages it by resident agents, money in bank and debts due it, accumulated from the business, are taxable under Ky. Stats., 1903, section 4020, declaring all personal property situated in the State subject to taxation. Comth. v. R. G. Dun & Co. 108
4. Assessment—Franchises—Corporation—Statutory Provisions—Repeal.—Act of 1898 (Ky. Stats., 1903, section 2984a), conferring on the city assessor of cities of the first and second classes authority to assess the franchises of corporations, was repealed by Acts 1906, p. 83, c. 22, entitled; "An Act re-

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TAXATION—Continued—

lating to revenue and taxation," the purpose of which, as indicated by its context and supported by its title, was to reduce into one all the previous acts bearing on the subject, and providing that all acts and parts of acts in conflict with this act are hereby repealed except certain named acts, and that all franchises except those exercised in cities of the first class are to be valued and assessed by the State board of valuation and assessment, and hence the assessor of a city of the second class has no power to assess for taxation the franchise of corporations. City Covington v. Cov. & Cin. Bridge Co. 163

5. Property Liable—Property of Non-resident in Hands of Resident Trustee.—Constitution section 172 provides that all property not exempt shall be assessed for taxation at its fair cash value. Ky. Stats., 1903, c. 108, section 4020, provides that "all real and personal property within the State * * * shall be subject to taxation, unless the same be exempt from taxation by the Constitution * * *" Section 4022 provides that "for the purpose of taxation real estate shall include all lands within this State, and improvements thereon; and personal estate shall include every other species and character of property, that which is tangible as well as that which is intangible." Section 4058 requires that a trustee list property held by him in such capacity in the name of the real owner. Held, That notes, bonds and other securities owned by non-residents, but in the hands of a resident fiduciary for the purpose of controlling and investing, are taxable at the place of his residence. Higgins v. Comth. 211

6. Exemptions—Charitable Institutions.—A corporation, whose sole object is to provide a suitable home for the destitute widows and orphans of deceased members of a certain secret society of the State, is an "institution of purely public charity," within the meaning of Constitution section 170, and its property is exempt from taxation. Widows' and Orphans' Home of O. F. v. Comth. 386

7. Bank Deposits.—While a bank may credit a customer's deposit on his overdue paper held by the bank, the money belongs to the customer, and is subject to his checks until the bank exercises this right; and, until this is actually done, the money is taxable in the depositor's hands as if he owed nothing to the bank. Comth., by, etc., v. Wathen 573

8. Corporate Stock—Assessment.—Corporate stock subject to assessment for taxation should be listed at its market value, which includes the face and premium values. Comth. v.

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TAXATION—Continued—

Steele 670

9. Same.—Under Ky. Stats., 1903, section 4085, providing that property of corporations shall be assessed in the name of the corporation, and so long as it pays the taxes the stockholders shall not be required to list their shares, the Commonwealth must first proceed against the corporation, and where it seeks to list corporate stock in the hands of stockholders it must show that it first proceeded against the corporation, or it will be presumed that the corporation listed its property as required by law. Idem 670

10. Collection—By "Law."—The term by "law," as used in Ky. Stats., 1903, section 4129, providing that the sheriff shall be collector of all taxes, unless the payment thereof is by law directed to be made to some officer, means a statute, and does not include an order of the fiscal court. Comth., for Use, etc., v. Wades Admr. 791

11. Same—Appointment of Collectors—Special Assessments.—Under Ky. Stats., 1903, section 4131, authorizing the county court where there is no sheriff to appoint a collector of all taxes due the State, county, or taxing districts, or a separate collector for money due the State, county, etc., authorized to be collected by the sheriff, only one collector may be appointed to collect the taxes for any division, and, where one is appointed to collect county revenue, another can not be appointed to collect some special assessments therein. Idem 791

12. Same—Duties of Collectors.—The collectors authorized to be appointed take the place of the sheriff and fill his office so far as the collection of revenue is concerned, and it is their duty to collect all taxes levied and collectible for that year, whether State or county, regular or special. Idem.....791

13. Same—Legality of Appointment—Collector of Special Taxes.—A nomination by the fiscal court of a collector of a special tax is void. Idem 791

14. Same—Liability on Official Bond.—Under Ky. Stats., 1903, section 4147, providing that if the sheriff or collector of revenue without reasonable excuse fails to pay to any person entitled thereto the amount due upon any claim allowed by the fiscal court and payable out of the taxes levied by it, if collected or collectible by him, he and his sureties shall be liable therefor, where a special levy was made by the fiscal court to pay a judgment against a county and a collector of State and county taxes was appointed, and gave bond, and his attention was called to the special tax, but he refused to

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TAXATION—Continued—
collect it, but did not pretend that it was not collectible, he and his sureties are liable on his official bond. Idem.....791
15. Same—Necessity for Certification of Levy.—It is the duty of the sheriff or collector of revenue to take notice of the levy of taxes by the fiscal court and to collect and distribute it as by law required, and a special certification of the levy is not required. Idem 792

TELEGRAPHS—
1. Operation—Actions for Damages—Questions for Jury.—In an action against a telegraph company for failure to deliver a message notifying plaintiff of her brother's death, where the evidence showed that the brother was buried the same evening before she could have reached the place, but if she had received the telegram she would have telegraphed to delay the funeral, and her wishes would have been complied with, and she could have been present at the funeral, defendant's failure to deliver the message was sufficiently the proximate cause of plaintiff's inability to attend the funeral, and consequent grief, to warrant the submission of the issue to the jury. Western Union Telg. Co. v. Caldwell 42
2. Same—Verdict—Excessive Damages.—In an action against a telegraph company for failure to deliver a message notifying plaintiff of her brother's death, whereby she was prevented from attending his funeral, a verdict for $1,000, though more than should have been awarded, is not so excessive and palpably unjust as to warrant a reversal. Idem 42

TIE VOTE—See Elections, 4.

TRAMWAY—See Eminent Domain.

TRESPASSERS—See Railroads, 19, 20, 21.

UMPIRE—See Fire Insurance, 6, 7.

USURPATION OF OFFICE—See Office and Officer, 5, 6, 7—Schools and School Districts, 5.

VENUE—See Fire Insurance, 1.

VERDICT—See Criminal Law, 15—Telegraphs, 2.

WAIVER—See Contracts, 8, 9, 10.

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WARNING ORDER—See Judgments, 3.

WARRANTY—See Guardian and Ward, 2—Sales, 1.

WILLS—

1. Property Passing—Damages for Death.—Under Constitution section 241 and Ky. Stats., 1903, section 6, recovery may be had for wrongful death, and the proceeds become a part of decedent's estate, where he leaves no wife, parents, or children, to go to his relatives after the payment of his debts. Under Ky. Stats., 1903, section 4839, a will takes effect as if executed immediately before the testator's death. Section 4825 authorizes one to will any estate he may be entitled to at his death. Held, That damages recovered by an administrator for decedent's wrongful death do not pass under the will. Sturges, etc., v. Sturges, etc. 80
2. Executors—Payment of Debts—Property Available—Right of Action for Causing Death.—Under the express terms of Ky. Stats., 1903, section 6, recovery for wrongful death is subject to the payment of decedent's debts where he leaves no wife, parent, or children, and is properly applied to the discharge of lien debts against devised property. Idem..... 80
3. Insurance — Mutual Benefit Association — Charter — Amendment.—The Legislature could amend the statute under which a mutual benefit insurance association was organized so as to limit the scope of business authorized under its charter in so far as the amendment did not impair the obligation of existing contracts. Idem 81
4. Same—Who May be Beneficiary.—In 1894 a mutual benefit association was chartered to insure its membership and to pay the death benefits to the members' families, executors, etc. House Bill No. 370, section 6 (as amended 97 Ohio Laws, p. 422), provides such associations shall pay the benefits only to the family, heirs, etc. Held, That the association's charter was amended by the act, and that policy contracts entered into between it and its members after the act took effect must conform to it, and hence insured could not validly designate his estate as beneficiary. Idem 81
5. Same—Void Designation—Right of Former Beneficiary.—A beneficiary's rights under an insurance policy are unaffected by a void attempt to substitute beneficiaries. Idem 81
6. Perpetuities—Suspension of Power of Alienation.—A devise of land to two devisees, upon the condition that devisees shall

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WILLS—Continued.

reside on the farm, the farm never to be sold, leased, or rented, no blue grass field to be plowed, no stock to be pastured except such as is owned by the devisees, and no tobacco to be raised, but that, should either of the devisees die without leaving issue, then her share to go to the surviving devisee, and should both die without leaving issue, then the land to go to a third person, was not void as creating a perpetuity; the limitations being only upon the land while held by the devisees first named. Holt's Exr. v. Deshon 310

7. Devise Subject to Payment of Money—Lien.—Under Ky. Stats., 1903, section 2066, providing that, when any property shall be devised subject to the payment by the devisee to another of a sum of money, the latter shall have a lien on the legacy for the sum so to be paid, where a will provided that, should either of two devisees die without leaving issue, then her share should go to the surviving devisee upon payment by her to the husband of the deceased devisee of a sum named, the husband of the deceased devisee had a lien upon her share of the land to secure the payment of the sum named. Idem 310

8. Devise on Condition—Reasonableness.—While devisees of land on condition that they shall reside thereon must make it their residence, a temporary absence is not a ground of forfeiture. Idem 310

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